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28

General Editor

LORD CHORLEY, Q.C., M.A.

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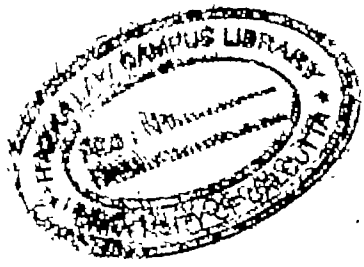

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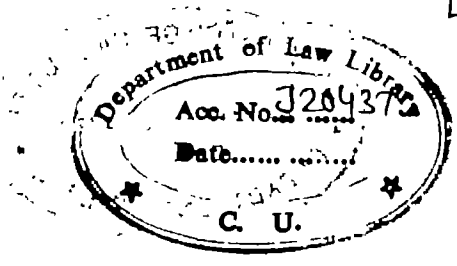

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THE
MODERN LAW REVIEW

Volume 31 January 1968 No. 1

PROFESSOR JOSEPH UNGER

JOSEPH UNGER died suddenly in London on October 20, 1967. For many years he had been Book Review Editor of the *Modern Law Review* and before that, from the inception of the *Review*, had acted as secretary of the Editorial Committee.

The unstinted and devoted service which he gave were of inestimable value to the *Review*: indeed it is no exaggeration to say that but for his tenacity and resilience during the war years it would have faded out, for it had come into existence only a very short time before the calamity of war fell upon it. It was a time of strict paper rationing, and of printing and publishing difficulties; a time when the Editorial Committee was scattered over the world and management had to be done by the secretary from a provincial university; a time when manuscripts were hard to come by. That these problems were solved was in large measure due to Unger's tireless energy and unremitting attention to detail. To his colleagues on the Editorial Committee who will miss his wise counsel his death brings a feeling of personal loss. The legal world and particularly the academic side of it stands very much in his debt.

Joseph Unger came to England from Hanover as a very young man at the time of the Nazi persecution. He had already commenced his legal studies in Germany, and on settling in London registered (1935) as a student for the LL.B. at the London School of Economics, obtaining that degree and also the LL.M., in which he achieved distinction. During this period he was awarded a university scholarship in law.

Shortly after obtaining his LL.M. he joined the teaching staff at Aberystwyth College in the University of Wales, and remained there until he transferred to Birmingham as Reader in International Law and where he was afterwards appointed to the Barber Professorship. This he held from 1960 until the date of his death. His work was marked not only by intellectual distinction but by the high quality of his teaching. He won not only the respect and admiration of his students, but also their affection, so much so that at the time of his transfer to Birmingham a great number of them signed a protest to the University of Wales asking that his departure should be prevented by appointment to a chair in that University.

C.

VOID OR VOIDABLE?—NATURAL JUSTICE AND UNNATURAL MEANINGS

MANY of the rules of English administrative law are based on the analogy of rules governing judicial decisions. In particular, the question whether a defect in an administrative act renders that act void or voidable is usually answered by applying the corresponding rules applicable to defects in judicial decisions. According to the traditional rule laid down by Coke in *The Marshalsea*,[1] a judgment is void only if made without jurisdiction; other defects merely render the judgment voidable. The decision in *The Marshalsea* goes on to explain the effects of this distinction; a voidable judgment is by definition open to direct attack, but it is not open to collateral attack; only a void judgment may be impugned in collateral as well as direct proceedings.

Unfortunately, the courts have not applied these rules in a consistent manner. The distinction between direct and collateral attack has frequently been distorted or even ignored,[2] and the definition of jurisdiction has varied widely from case to case.[3] Such fluctuations are largely explicable in terms of judicial policy—at different times the courts have shown different degrees of readiness to interfere with the decisions of inferior tribunals and administrative agencies. But the introduction of these contradictions has been a great source of confusion in later cases; the policy reasons underlying the earlier judgments are lost sight of, and much muddled thinking is expended in a vain attempt to reconcile the irreconcilable, which usually makes confusion worse confounded.

The uncertainty reaches a climax over the rules of natural justice. Historical research indicates that breach of those rules was attacked by means of the writ of error before the prerogative writs were well developed, and for this purpose such breach was classified as error in fact, which rendered the resulting judgment voidable, not void.[4] As long as the writ of error and the prerogative

[1] (1612) 10 Co.Rep. 68b.

[2] Often it is not clear whether or not the courts regard the success of collateral attack as being dependent on the voidness of the decision; they allow collateral attack, frequently without stating whether the decision is void or voidable.

[3] The distinction between jurisdictional and non-jurisdictional questions becomes progressively harder to establish as the process of administrative determination ceases to resemble that of an ordinary court. Moreover, 17th-century lawyers used the word "jurisdiction" in a sense very different from the modern sense: Edith G. Henderson, *Foundations of English Administrative Law*, Harvard University Press, 1963, pp. 119–159.

[4] D. M. Gordon, "Certiorari and the Revival of Error in Fact" (1926) 42 L.Q.R. 521. Error in fact does not mean that the tribunal got the facts wrong. It is not easy to define; the essential thing is that it "arises from matters which are not only outside the issues before the trial court, but as to which ordinarily that court does not inquire at all" (Gordon, *loc. cit.* p. 526)

writs co-existed, it is hardly to be supposed that the intrinsic nature of a defect would vary according to the technique of review adopted. But, after the abolition of the writ of error in the nineteenth century, the very concept of error in fact came to be forgotten. Lawyers who regarded jurisdictional defects and error of law on the face of the record as the only two grounds justifying the issue of certiorari, which in the mid-nineteenth century was the main form of reviewing administrative decisions, were faced with the Procrustean task of fitting breach of the rules of natural justice into one of these two categories. Breach of those rules did not normally appear on the record; and therefore, like jurisdictional defects but unlike error of law on the face of the record, it could be (and in practice had to be) proved by affidavit.[5] For these reasons there was considered to be no alternative to analysing breach of the rules of natural justice in jurisdictional terms.[6]

The fact that this conclusion is based on a misunderstanding of legal history does not necessarily mean that it is not good law today. In examining modern law, the question to be asked is not whether a principle is historically sound, but whether it is supported by strong authority, consistent with logic,[7] and in accordance with the requirements of contemporary society.

However, care must be used in evaluating the authorities. Even in the early days, when error in fact and the principles in *The Marshalsea* were well understood, it is possible to find dicta that breach of the rules of natural justice will render a decision void.[8] The explanation is that the word "void" has often been loosely

—*e.g.*, the fact that the parties have not been properly summoned or are not of full age and capacity, improper constitution of the tribunal, death of a party *pendente lite*, etc. If an objection was made at first instance on these grounds and was overruled, the error ceased to be error in fact, and became error in law, incorporated in the record; but the judgment was still only voidable.

[5] *e.g.*, *R.* v. *Wandsworth JJ., ex p. Read* [1942] 1 K.B. 281. Of course extrinsic evidence had been admissible to prove error in fact: Gordon, *loc. cit.* pp. 528–529.

[6] *e.g.*, *R.* v. *Paddington North and St. Marylebone Rent Tribunal, ex p. Perry* [1956] 1 Q.B. 229, 237, *per* Lord Goddard C.J.

[7] Many of the alleged logical objections to regarding breach of the rules of natural justice as going to jurisdiction are based on an over-restrictive definition of jurisdiction. The courts have always regarded jurisdiction as a notoriously elastic concept, and there is moreover a difference between want of jurisdiction and excess of jurisdiction. For instance, a magistrates' court clearly does not lack jurisdiction to try a parking offence; but if it purports to impose the death penalty for that offence, can anyone doubt that it exceeds its jurisdiction? (*Cf.* D. M. Gordon, "The Observance of Law as a Condition of Jurisdiction" (1931) 47 L.Q.R. 386, 393, n. 26.) Breach of the *audi alteram partem* principle might produce either a want of jurisdiction (*e.g.*, where a defendant is not summoned) or an excess of jurisdiction (*e.g.*, where he is summoned but not allowed to address the court); for an example of the importance of this distinction, see below, p. 5, note 18. Breach of the *nemo judex* principle might also lead either to absence or to excess of jurisdiction, depending upon whether the precise composition of the tribunal is fixed before or after proceedings are instituted.

[8] *James Bagg's Case* (1615) 11 Co.Rep. 93b, 99a (*audi alteram partem*); *Sir Nicholas Bacon's Case* (1568) 2 Dyer 220b (*nemo judex in causa sua*).

used as a synonym for "defective," thus including the concept of "voidable." Terminology has become more precise in modern cases, but the judges are still sometimes guilty of lapses; judicial interpretation of the words "absolutely void" in the Infants Relief Act 1874 is a prime example. If words like "void," "voidable" and "nullity" can be used loosely, then *a fortiori* no reliance can be placed on more ambiguous words such as "bad," "invalid," "defective" or "irregular." Even references to jurisdiction may be made *per incuriam*.

Judicial inconsistency is not confined to questions of terminology. The judges may hold that a particular defect renders a decision void in some circumstances, and voidable in others. The explanation is that such findings will influence the outcome of different types of litigation in different ways, and the vagueness of the void-voidable distinction tempts the judges to manipulate the distinction arbitrarily in order to meet the differing requirements of justice caused by the differing facts of each case.

The purpose of this article is therefore to examine *separately* the different contexts in which the distinction between void and voidable decisions has arisen; to analyse the effect, if any,[9] which the distinction has on the outcome of litigation in each class of case; and to discuss, *de lege ferenda*, whether the distinction should be retained as a means of deciding practical problems, or whether it can and should be replaced by a more just and precise criterion. The first part of the article will examine the distinction between void and voidable decisions in the context of direct attack; the second part, to be published in a later number of the *Modern Law Review*, will examine the distinction in the context of collateral attack, together with certain problems which are common to both forms of attack, and will attempt to draw general conclusions.

I—Direct Attack [10]

Dicta concerning the effect of breach of the rules of natural justice abound in cases where breach of those rules was invoked as a ground for appealing against judgments, or for asking for them to be set aside, or for attacking decisions of inferior tribunals by means of injunctions and certiorari.

As regards the rule *nemo judex in causa sua*, there is a very clear statement in *Dimes* v. *Grand Junction Canal* [11] that its violation merely renders a judgment voidable, and this was repeated *obiter* by the Court of Exchequer Chamber in *Phillips* v. *Eyre*.[12]

[9] In many situations the relevance of the distinction to the solution of practical problems is more apparent than real. It is essential to expose these situations, not only in order to see whether judicial statements about void and voidable decisions constitute the *ratio decidendi* or mere *obiter dicta*, but also in order to understand the *real* principles governing such cases.

[10] Cases concerning declaratory judgments, prohibition and certain other questions which raise special problems are postponed for separate discussion.

[11] (1852) 3 H.L.C. 759 (appeal).

[12] (1870) L.R. 6 Q.B. 1, 22.

Dimes v. *Grand Junction Canal* was concerned with a superior court, and, when we turn to inferior tribunals, a rather different picture emerges. In actions for an injunction against the General Medical Council, the Court of Appeal has suggested, without carefully considering the matter, that a decision would be void if tainted by interest or bias.[13] Such defects have also been described as going to jurisdiction, in certiorari cases affecting magistrates' courts [14] and rent tribunals.[15] On the other hand, in *R.* v. *Kent JJ.*,[16] the court refused mandamus, in order to compel justices to hear and determine an application according to law, until the justices' first decision had been quashed by certiorari; the reason was that the first decision, although vitiated by bias, remained in force until quashed. But it is doubtful whether this case is good law.[17]

A curious exception exists in the case of acquittal by magistrates who were biased against the prosecutor. Here the bias merely renders the acquittal voidable; if the prosecutor brings another prosecution, he will be met with a plea of *autrefois acquit*, unless he can first get the acquittal quashed by certiorari—and the courts deliberately refuse to quash the acquittal, in order to preserve the accused's plea of *autrefois acquit*.[18] This is most indicative of the flexibility of the concept of nullity; bias goes to jurisdiction only when it is in the accused's interests that it should do so. (If the acquittal were void, it would, of course, not give rise to a defence of *autrefois acquit*; and it would make no difference whether the prior steps in the trial were void or not, or whether or not the acquittal was quashed by certiorari.)

There are a large number of cases concerned with the impact on judicial decisions of failure to observe the *audi alteram partem*

[13] *Leeson* v. *General Medical Council* (1889) 43 Ch.D. 366, 372, 379; *Allinson* v. *General Medical Council* [1894] 1 Q.B. 750, 757.

[14] *R.* v. *Nat Bell Liquors Ltd.* [1922] 2 A.C. 128, 160 (P.C.). *Cf. R.* v. *Rand* (1866) L.R. 1 Q.B. 230.

[15] *Ex p. Kendal Hotels Ltd.* [1947] 1 All E.R. 448; *Ex p. Perry* [1956] 1 Q.B. 229, 237.

[16] (1860) 44 J.P. 298.

[17] In other cases with similar facts, mandamus was issued without certiorari, and without any discussion whether the first decision was void or voidable: *R.* v. *L.C.C., ex p. Akkersdyk* [1892] 1 Q.B. 190; *R.* v. *Halifax JJ., ex p. Robinson* (1913) 76 J.P. 233 (C.A.). (It must, however, be admitted that in the latter case mandamus was coupled with prohibition.) *Cf.* Amnon Rubinstein, *Jurisdiction and Illegality*, Oxford University Press, 1965, pp. 98–105, and the use of mandamus to reinstate dismissed office-holders: *Bagg's Case* (1615) 11 Co.Rep. 93b; *R.* v. *Gaskin* (1799) 8 T.R. 209; *R.* v. *Smith* (1844) 5 Q.B. 614.

[18] *R.* v. *Antrim JJ.* [1895] 2 I.R. 603; *R.* (*Hastings*) v. *Galway JJ.* [1906] 2 I.R. 499; *R.* v. *Simpson* [1914] 1 K.B. 66. See also *R.* v. *Middlesex Quarter Sessions* (*Chairman*), *ex p. D.P.P.* [1952] 2 Q.B. 758; but it is not clear whether this case is really concerned with natural justice, and the Court of Criminal Appeal merely held that it could not issue a *venire de novo*, because the trial was not void *ab initio*. Violation of natural justice can theoretically render a decision void, without rendering the proceedings void *ab initio* (*pace* Lord Evershed in *Ridge* v. *Baldwin* [1964] A.C. 40, 93; see above, p. 8, note 7).

principle. Modern authorities make it clear that a judgment will be void if a party is not given notice of proceedings,[19] or is not allowed to address the court.[20] It is true that in these cases statutory rules had been violated, but the judgments speak expressly of natural justice and regard the statutory rules as declaratory of the common law.

The situation is complicated by the introduction of statutory rules concerning substituted service. If a court permits substituted service in circumstances where it should not have been permitted, the resulting judgment is merely voidable.[21] On the other hand, substituted service is treated as an exception to the normal rules concerning personal service, and as something to be confined within narrow limits. Consequently, the slightest failure to observe the statutory procedure for substituted service will invalidate the service; defective substituted service is regarded as equivalent to no service at all, which is a violation of natural justice, and the resulting judgment is therefore void.[22]

It is uncertain to what extent the rules laid down concerning judgments of ordinary courts are applicable to administrative decisions.[22a] Many of the cases deal with legislative provisions concerning service, but the courts, wherever possible, tend to regard these as equivalent to natural justice, or at least to interpret them in conformity with the rules of natural justice, and their decisions are full of dicta about natural justice. A more serious objection is that "the practice in regard to writs and the requirements of the law in regard to the service of writs are, and have always been, regarded as matters strictissimi juris."[23] One might therefore

[19] *R.* v. *Huntingdon Confirming Authority* [1929] 1 K.B. 698, 713 (C.A.—certiorari to licensing justices); *Re the Affairs of Hart* (1943) 169 L.T. 60 (C.A.—appeal from county court).

[20] *Disher* v. *Disher* [1965] P. 31 (D.C.—appeal from magistrates' court).

[21] *Fry* v. *Moore* (1889) 23 Q.B.D. 395 (C.A.—appeal from High Court judgment by default); *Wilding* v. *Bean* [1891] 1 Q.B. 100 (application to set aside order for substituted service); *Wiseman* v. *Wiseman* [1953] P. 79 (C.A.—appeal from divorce decree). See also *Lazard Brothers & Co.* v. *Midland Bank Ltd.* [1933] A.C. 289, 307 (H.L.).

[22] *Craig* v. *Kanssen* [1943] K.B. 256 (C.A.—motion to set aside order of High Court); *Everitt* v. *Everitt* [1948] 2 All E.R. 545 (C.A.—appeal against divorce decree). There are a large number of certiorari cases which make the same point: *R.* v. *Evans* (1850) 19 L.J.M.C. 151; *R.* v. *Smith* (1875) L.R. 10 Q.B. 604; *R.* v. *Lee* (1888) 52 J.P. 344; *R.* v. *Farmer* [1892] 1 Q.B. 637 (C.A.); *R.* v. *County of London Quarter Sessions Appeals Committee, ex p. Rossi* [1956] 1 Q.B. 682, 695, 698–699 (C.A.); *Nair* v. *Teik* [1967] 2 All E.R. 84 (P.C.).

[22a] The distinction between superior and inferior courts made by the High Court of Australia in *Cameron* v. *Cole* (1943) 68 C.L.R. 571, 585, 590–591, 598–599, 604–605 is not supported by any of the English cases, and is contrary to *Craig* v. *Kanssen* (*supra*), *Marsh* v. *Marsh* [1945] A.C. 271, 284 (P.C.) and *Hamp-Adams* v. *Hall* [1911] 2 K.B. 942 (C.A.).

[23] *Re a Debtor* [1939] Ch. 251, 256, *per* Sir Wilfrid Greene M.R.

expect the courts to adopt a more indulgent attitude towards administrative decisions, but there is no sign of this in practice.[24]

One last point to be mentioned is that in none of the cases mentioned in this section, with one or two exceptions,[25] did it matter whether the decision was void or voidable. The remedy sought, whether by way of appeal, motion to set aside judgment,[26] injunction or certiorari, was available irrespective of whether the decision impugned was a nullity or not. Consequently, all the statements on the subject of voidness and voidability were, strictly speaking, *obiter dicta*. There was, however, an interesting suggestion made in *Disher* v. *Disher* [27] that, if the decision had merely been voidable, the court in its discretion might have refused to allow the appeal, on the grounds that there had been no substantial miscarriage of justice. This suggestion is only explicable on the assumption (refuted by other passages in the judgment) that statutory rules, and not natural justice, had been violated, because breach of the rules of natural justice always vitiates a decision, whether or not there was a substantial miscarriage of justice, and whether or not the decision would have been the same if the rules had been observed.[28] The court has no option but to quash or reverse the decision, and it is immaterial whether the decision was void or voidable.

On the whole, then, breach of the rules of natural justice is regarded as rendering a decision void, with the possible exception of bias or interest in superior courts, and decisions of acquittal in criminal cases. But the question has seldom been carefully considered, because it hardly ever affected the practical outcome of litigation.

[24] *Lapointe* v. *L'Association de Bienfaisance et de Retraite de la Police de Montréal* [1906] A.C. 535 (P.C.—action against domestic tribunal to compel proper administration of pension fund); *R.* v. *Paddington North and St. Marylebone Rent Tribunal, ex p. Perry* [1956] 1 Q.B. 229, 237 (D.C.—certiorari to rent tribunal).

[25] The most outstanding exceptions are the cases on acquittal by biased magistrates (*supra*, p. 5). Another exception is *R.* v. *Kent JJ.*, *supra*, p. 5, but it is submitted that that case was wrongly decided. The question of waiver of the rules of natural justice will be discussed in the second part of this article.

[26] Apart from statutory exceptions, all tribunals have an inherent power to reconsider and, if necessary, set aside their own decisions taken without a hearing, whether the previous decision was void or voidable: *de Verteuil* v. *Knaggs* [1918] A.C. 557 (P.C.); *Ridge* v. *Baldwin* [1964] A.C. 40, 79, 97–99, 119–120, 129 (H.L.); *R.* v. *County of London Quarter Sessions Appeals Committee, ex p. Rossi* [1956] 1 Q.B. 682, 693–694 (*per* Denning L.J.). *Contra*, *Gregory* v. *Murphy* [1906] V.L.R. 71, 76–77. *Cf.* the divergent conclusions reached in *Cameron* v. *Cole* (1943) 68 C.L.R. 571, 583–584, 590–591, 593, 599–600, 607. A possible exception may exist in the case of acquittals in criminal trials: *cf. R.* v. *Marsham, ex p. Pethick-Lawrence* [1912] 2 K.B. 362 (D.C.).

[27] [1965] P. 81.

[28] *General Medical Council* v. *Spackman* [1943] A.C. 627, 644–645; *R.* v. *Smith* (1844) 5 Q.B. 614; *Ridge* v. *Baldwin* [1964] A.C. 40, 61, 68, 79, 114, 128–129; *Dimes* v. *Grand Junction Canal* (1852) 3 H.L.C. 759, 793 (*per* Lord Campbell); *R.* v. *Recorder of Cambridge* (1857) 8 E. & B. 637, 643; *R.* v. *Abingdon JJ., ex p. Cousins*, 108 S.J. 840. The rule seems unnecessarily strict; but it is the law.

II—DECLARATION

As its name implies, a declaration is, in strict theory, merely declaratory of existing rights; it does not constitute new rights. A declaration that a decision is voidable is an acknowledgment that the decision is liable to be quashed, but it does not actually quash the decision. Consequently, the courts have sometimes refused to issue declarations in respect of voidable decisions, because they consider that public respect for the courts would be impaired if they passed judgments which the defendant was under no legal obligation to obey.[29] One would therefore expect that the cases in which declarations were sought on the grounds of breach of natural justice would throw a considerable light on the question whether breach of those rules renders a decision void or voidable.

But this is not so in practice. The courts have often issued declarations where natural justice has been violated, without any discussion as to whether the decision was void or voidable.[30] At other times declarations have been withheld (or issued upon other grounds) because the rules of natural justice were not applicable or had not been violated, but again there was no discussion as to whether breach of the rules would have rendered the decision void or voidable; and no suggestion that success in an action for a declaration was dependent upon the decision being void.[31] Even when the courts grant declarations and say expressly that the decision is void, there is never any implication that voidness of the decision is a condition precedent to success of the action,[32] and it is unusual to find any serious consideration of the question whether the decision is void or voidable.[33] There are even one or

[29] *Healey* v. *Minister of Health* [1955] 1 Q.B. 221, 228, 230 (C.A.); *Punton* v. *Minister of Pensions and National Insurance* [1963] 1 W.L.R. 186 (C.A.). See also *Blencowe* v. *Northamptonshire County Council* [1907] 1 Ch. 504; *Reitzes de Marienwert (Baron)* v. *Administrator of Austrian Property* [1924] 2 Ch. 282; *East Midlands Gas Board* v. *Doncaster Corporation* [1958] 1 W.L.R. 54; *Walters* v. *Eton R.D.C.* [1950] 2 All E.R. 688.

[30] *Hoggard* v. *Worsborough U.D.C.* [1962] 2 Q.B. 93 (statutory duty to hear); *Burn* v. *National Amalgamated Labourers' Union* [1920] 2 Ch. 364; *Annamunthodo* v. *Oilfield Workers' Trade Union* [1961] A.C. 945 (P.C.); *Fisher* v. *Keane* (1878) 11 Ch.D. 353 (the headnote says the decision was void, but this language is not used in the judgment); *Law* v. *Chartered Institute of Patent Agents* [1919] 2 Ch. 276.

[31] *Pyx Granite Co. Ltd.* v. *Minister of Housing and Local Government* [1958] 1 Q.B. 554, 571 (*per* Denning L.J.); *University of Ceylon* v. *Fernando* [1960] 1 All E.R. 631 (P.C.); *Maclean* v. *Workers' Union* [1929] 1 Ch. 602; *Cassel* v. *Inglis* [1916] 2 Ch. 211; *Davis* v. *Carew-Pole* [1956] 1 W.L.R. 833; *Byrne* v. *Kinematograph Renters Society Ltd.* [1958] 1 W.L.R. 762; *Dawkins* v. *Antrobus* (1881) 17 Ch.D. 615 (C.A.); *Kildaff* v. *Wilson* [1939] 1 All E.R. 429 (C.A.); *de Verteuil* v. *Knaggs* [1918] A.C. 557 (P.C.).

[32] *Ealing Borough Council* v. *Minister of Housing and Local Government* [1952] Ch. 856 (statutory duty to hear); *Ridge* v. *Baldwin* [1964] A.C. 40; *Gray* v. *Allison* (1909) 25 T.L.R. 581; *Abbott* v. *Sullivan* [1952] 1 K.B. 189, 199, 208, 213 (C.A.); *Cooper* v. *Wilson* [1937] 2 K.B. 309, 324–325, 339–340, 348 (C.A.).

In *Russell* v. *Duke of Norfolk* [1939] 1 All E.R. 109, the Court of Appeal refused to grant a declaration, because the *audi alteram partem* principle was not applicable and had not been violated, but suggested that breach of the principle, if applicable, would have rendered the decision void.

[33] *Ridge* v. *Baldwin* is the only real example.

two cases which suggest that the decision is voidable, but do not preclude the possibility of obtaining a declaration on this ground.[34]

In only one case, *White* v. *Kuzych*,[35] was a declaration refused on the grounds that the decision was merely voidable, and the facts of the case were quite exceptional. The respondent had been expelled from his trade union by an allegedly biased decision. The union by-laws required appeal to the Shipyard General Workers' Federation before recourse to the courts was permitted. The Privy Council refused to grant the respondent a declaration, because he had not appealed first to the federation; the decision of expulsion was not void, but was a "decision" within the meaning of the union's by-laws. One cannot help thinking that the Privy Council was unduly obsessed by the alleged logical impossibility of appealing against a void decision,[36] and in any case its opinion was only concerned with the interpretation of the union's by-laws; it laid down no principles of general applicability. Even if the decision of expulsion had been considered merely voidable, not only within the meaning of the union's by-laws, but in other contexts as well, there is nothing to suggest that anything other than the by-laws would have precluded the court from granting a declaration.[37]

[34] *Momodu Lagunju* v. *Olubadan-in-Council* [1952] A.C. 887, 898–899 (P.C.); the declaration was sought on grounds other than breach of natural justice. In *Kanda* v. *Government of Malaya* [1962] A.C. 322, 338 (P.C.), breach of natural justice was pleaded, but the Privy Council issued a declaration on other grounds, and left open the question whether breach of natural justice rendered the decision void or voidable. In both these cases there was a statutory right to a hearing.

In *Taylor* v. *National Union of Seamen* [1967] 1 W.L.R. 532, the defendant had dismissed the plaintiff for misconduct, which, under the union's rules, had the effect of disqualifying him from holding certain offices in the union. Ungoed-Thomas J. held that the dismissal was contrary to natural justice, and issued a declaration that the plaintiff was not disqualified from holding the offices in question; but he did not issue a declaration that the dismissal was void, as it would have been "unreal" to treat the plaintiff as having remained in the defendant's service after he had in fact obtained other employment.

[35] [1961] A.C. 585, P.C.

[36] Carried to its logical conclusion, the nullity theory would mean that there was nothing to appeal against, and nothing to be reversed or confirmed on appeal. But for purposes of appeal, there is no reason why the word "decision" should not be interpreted to include "purported decision." For an alternative explanation, see Rubinstein, *op. cit.* pp. 51–52.

[37] The Privy Council's attitude towards the by-laws might seem more indulgent than the courts' reactions towards privative clauses in statutes, but it should be remembered that the by-laws sought only to postpone, not to exclude, the jurisdiction of the courts. As far as declarations are concerned, the courts have made no distinction between domestic and statutory tribunals, or between the two rules of natural justice, as may be seen by comparing the following list of cases with notes 30–35:

(1) *Audi alteram partem*—statutory tribunals: *Hoggard* v. *Worsborough U.D.C.*, *Pyx Granite Co. Ltd.* v. *Minister of Housing and Local Government*, *University of Ceylon* v. *Fernando*, *Kilduff* v. *Wilson*, *de Verteuil* v. *Knaggs*, *Haling Borough Council* v. *Minister of Housing and Local Government*, *Ridge* v. *Baldwin*, *Kanda* v. *Government of Malaya*, *Momodu Lagunju* v. *Olubadan-in-Council*.

(2) *Audi alteram partem*—domestic tribunals: *Burn* v. *National Amalgamated Labourers' Union*, *Annamunthodo* v. *Oilfield Workers' Trade Union*,

Apart from the exceptional facts of *White* v. *Kuzych*, the courts have never acknowledged any limitations on their power to issue declarations for breach of the rules of natural justice. Many of the cases contain dicta that breach of the rules renders the decision void, but the point has seldom been seriously considered. The striking thing is that in this context the courts' power to issue declarations has never been regarded as contingent upon the nullity of the decision impugned. Are the cases on natural justice an exception to the rule laid down in the *Healey* and *Punton* cases? Or is it the latter cases which are themselves exceptional and anomalous? There is a conflict here which the courts will have to resolve sooner or later, and the cases on natural justice certainly provide ammunition for distinguishing or overruling the *Healey* and *Punton* cases.

III—PROHIBITION

Prohibition raises the same sort of problems as a declaration, but for different reasons. The original function of the writ of prohibition was to restrain inferior tribunals from acting outside their jurisdiction.[38] Prohibition cases are therefore indicative of whether or not a particular defect goes to jurisdiction (which is synonymous with rendering a decision void).

In some judgments, prohibition has been issued on the grounds of breach of natural justice, and the court has said expressly that such breach went to jurisdiction.[39] In other cases prohibition has been granted to restrain a biased tribunal, without any discussion about jurisdiction and nullity.[40] Even when prohibition is withheld on the grounds that no bias is proved, no attempt has been made to question the propriety of the application.[41]

Fisher v. *Keane*, *Cassel* v. *Inglis*, *Davis* v. *Carew-Pole*, *Byrne* v. *Kinematograph Renters Society Ltd.*, *Dawkins* v. *Antrobus*, *Gray* v. *Allison*, *Abbott* v. *Sullivan*, *Russell* v. *Duke of Norfolk*, *Taylor* v. *National Union of Seamen*.

(3) *Nemo judex in causa sua*—statutory tribunals: *Law* v. *Chartered Institute of Patent Agents*, *Pyx Granite Co. Ltd.* v. *Minister of Housing and Local Government*, *Kilduff* v. *Wilson*, *Cooper* v. *Wilson*.

(4) *Nemo judex in causa sua*—domestic tribunals: *Maclean* v. *Workers' Union*, *Dawkins* v. *Antrobus*, *Taylor* v. *National Union of Seamen*, *White* v. *Kuzych*.

[38] Comyn's *Digest*, Vol. 7, p. 813; 6 Bacon's Abridgment (7th ed.), p. 564; *Peel's Case* (1688) Cro.Car. 113; *Anon.* (1647) Style 45. There are many modern judicial statements to the same effect.

[39] *R.* v. *North*, *ex p. Oakey* [1927] 1 K.B. 491 (*audi alteram partem*); *Sergeant* v. *Dale* (1877) 2 Q.B.D. 558 and *Ex p. Medwin* (1853) 1 E. & B. 609, 614 (*nemo judex in causa sua*). Similar dicta concerning the *nemo judex* rule appear in overseas authorities where prohibition was refused since no bias was proved: *R.* v. *Davison* [1918] 2 I.R. 342, 366–367; *Re Ashby* [1934] O.R. 421, 431–432; *Wentworth Canning Co.* v. *Farm Products Marketing Board* [1950] 2 D.L.R. 245, 249.

[40] *R.* v. *Halifax JJ.*, *ex p. Robinson* (1912) 76 J.P. 233; *R.* (*Courtney*) v. *Emerson* [1918] 2 I.R. 377; *R.* v. *Salford Assessments Committee*, *ex p. Ogden* [1937] 2 K.B. 1 (C.A.).

[41] *Brooks* v. *Earl of Rivers* (1669) Hardr. 506; *R.* v. *Farrant* (1887) 20 Q.B.D. 58; *R.* v. *Australian Stevedoring Industry Board* (1953) 88 C.L.R. 100. *Cf.* *Ex p. Story* [1950] S.R. (N.S.W.) 195 (*audi alteram partem*).

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On the other hand, in *Re Lenaghan*,[43] a county court judge was empowered by statute to hear cases "upon due proof of the service of summons"; it was held that it was for the county court judge to decide whether there was adequate proof of service, and that any mistake which he made on this score could not go to jurisdiction; so prohibition was refused. This case is not contrary to the cases just mentioned; it is an exception based on a particular statute. Indirectly, the case emphasises that prohibition only issues for jurisdictional defects; it thereby increases the significance of cases where prohibition has been granted for breach of natural justice.

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Yet *Dimes* v. *Grand Junction Canal*[43] and *Phillips* v. *Eyre*[44] suggest that prohibition may lie against decisions that are merely voidable for bias. These suggestions are only *obiter*, but they do show that statements about prohibition only issuing for want of jurisdiction cannot always be taken literally.

There are also other indications that the traditional equation between prohibition and lack of jurisdiction has underestimated the scope of prohibition—*and not only in natural justice cases.* In the past it normally did not matter if prohibition was limited in scope, as other remedies, such as certiorari, were available; but certain courts (notably the ecclesiastical courts) were subject to prohibition but not to certiorari, and between 1750 and 1850 prohibition was used almost as a form of appeal from such courts.[45]

Again, most modern writers treat prohibition and certiorari together. For a time it was supposed that certiorari only lay for jurisdictional defects, and the limitations inherent in this theory were evaded by simply distending the whole concept of jurisdiction.[46] Even today, the only *indisputably* non-jurisdictional ground for certiorari is error of law on the face of the record; yet certiorari and prohibition are so similar that many writers predict that prohibition will be granted on this ground also.[47]

It may well be, therefore, that prohibition, like the declaratory judgment, is outgrowing the limitations placed upon it by orthodox theory. In future years the availability of prohibition in natural justice cases may no longer be treated as evidence that breach of natural justice goes to jurisdiction, and dicta equating such breach with want of jurisdiction can consequently be expected to decline in frequency.

[43] (1848) 2 Exch. 833; followed in *Re Zohrab* v. *Smith* (1848) 17 L.J.Q.B. 174 (statute required proof that service of the summons came to the knowledge of the defendant 10 clear days before the return day of the summons).

[43] (1852) 3 H.L.C. 759, 785–786, *per* Parke B.

[44] (1870) L.R. 6 Q.B. 1, 22.

[45] D. M. Gordon (1931) 47 L.Q.B. 386, 393–394; Edith G. Henderson, *Foundations of English Administrative Law*, Harvard University Press, 1963, pp. 120–127.

[46] Rubinstein, *op. cit.* pp. 82–94. The same process was not applied to prohibition, except in the case of ecclesiastical courts.

[47] *e.g.*, S. A. de Smith, *Judicial Review of Administrative Action*, London, Stevens, 1959, p. 303.

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IV—Election of Remedies and Privative Clauses

The speeches of the House of Lords in *Ridge* v. *Baldwin* contain an unusually detailed discussion of the question whether breach of the *audi alteram partem* principle had rendered the decision in dispute void or voidable. Lords Reid,[48] Morris of Borth-y-Gest [49] and Hodson [50] thought that the decision was void. Lord Devlin considered that at common law the decision would merely have been voidable, but that the Police Discipline Regulations had the effect of making it void.[51] Lord Evershed, who dissented, regarded the decision as voidable, but suggested that it would have been void if it had been taken, not only without a hearing, but also on frivolous or futile grounds.[52] Moreover, many passages in the speeches discuss the effects of breach of natural justice as a whole, and are not limited to the *audi alteram partem* principle.[53]

Why was it so important to decide whether the decision was void or voidable? Not in order to justify applying for a declaration—as usual in natural justice cases, there was no suggestion that a declaration could only be used to challenge void decisions. The real points at issue were summed up most compendiously by Lord Hodson: "Thus it was said, since the decision of the Home Secretary . . . was final the appellant had waived his right to bring an action in the courts alleging that invalidity . . . The answer to this point is . . . that the decision . . . taken by the watch committee was at all times a nullity, and nothing that was done thereafter by way of appeal could give it validity." [54] In fact, however, there were at least two separate issues involved here, and it will make for clarity if we analyse them separately.

First, there was the idea that appeal to the Home Secretary was in some way an alternative to recourse to the courts; the plaintiff must be put to his election between these two remedies,

[48] [1964] A.C. 40, 80–81.
[49] *Ibid.* at pp. 113, 117–120; but see the rather equivocal passage at pp. 125–126.
[50] *Ibid.* at pp. 185–186.
[51] *Ibid.* at pp. 188–189.
[52] *Ibid.* at pp. 86–94, 100.
[53] *Ibid.* at pp. 80, 85, 136, 140–141.
[54] *Ibid.* at pp. 185–186. *Cf.* Lord Devlin at p. 139: "If it [the decision by the watch committee] was a nullity, it is not seriously argued that any subsequent proceedings before the Secretary of State could bring it to life."

Counsel for the defendants sought to evade this conclusion by arguing that the plaintiff was estopped from alleging the nullity of the decision, as a result of having appealed against it to the Home Secretary. But there is no general rule that an administrative appeal against a decision estops subsequent allegations that the decision is void (*per* Lord Reid at pp. 80–81); an administrative appeal does not constitute an act of affirmation, any more than a judicial appeal does (*cf. supra*, p. 9, note 36). If the plaintiff had not invoked breach of natural justice during his appeal to the Home Secretary, he might have been deemed to have waived such breach, and to have estopped himself from invoking it in the future; and this result would probably be the same, regardless of whether or not the breach was considered to go to jurisdiction (*R.* v. *Commissioner of Valuation* [1901] 2 I.R. 215, 230–231). But there was no question of waiver in *Ridge* v. *Baldwin*, since the plaintiff invoked breach of natural justice during his appeal to the Home Secretary, as well as during his action before the courts.

and, by appealing to the Home Secretary, he must be deemed to have waived his right to go to court. This argument was rejected on the grounds that the plaintiff, in his appeal to the Home Secretary, "reserved his right to maintain [before the courts] that the decision was a *nullity*." [55] This suggests that the plaintiff would have been put to his election if the decision had merely been voidable, but Lord Reid invoked a wider ground for his decision, which did not turn upon the distinction between void and voidable decisions: "there are many cases where two remedies are open to an aggrieved person, but there is no general rule that by going to some other tribunal he puts it out of his power thereafter to assert his rights in court." [56] There is, in fact, no authority for such an alleged rule [57]; nor could the plaintiff be said to be acting inconsistently, or to be approbating and reprobating, by appealing to two bodies on substantially similar grounds.

Secondly, reference was made to section 2 (8) of the Police Appeals Act 1927, which provides that the Home Secretary's "order shall be final and binding," and it was suggested that only the nullity of the watch committee's decision (and of the Home Secretary's decision confirming it) prevented section 2 (8) from excluding recourse to the courts.[58] But this suggestion is out of keeping with a long line of earlier cases, which hold that a finality clause is ineffective to prevent the courts exercising their inherent power of *review*; it merely excludes such rights of *appeal* as might otherwise exist.[59]

Altogether, then, it would appear that there is no authority for the arguments concerning estoppel, election of remedies, and the finality of the Home Secretary's decision, which were put forward in *Ridge* v. *Baldwin*, so that the outcome of the case did not turn in any way upon the question whether the decision in dispute was void or voidable.

[55] [1964] A.C. 40, 80–81 (Lord Reid) and 126 (Lord Morris of Borth-y-Gest). Italics added.

[56] *Ibid.* at pp. 80–81.

[57] Counsel for the defendants cited *Barraclough* v. *Brown* [1897] A.C. 615. The headnote of that case says: "Where a statute gives a right to recover expenses from a person *who is not otherwise liable*, there is no right to come to the High Court for a declaration that the applicant has a right to recover the expenses in a court of summary jurisdiction; he can only take proceedings in the latter court" (italics added). The statute in *Barraclough* v. *Brown* conferred a right and a remedy (in a court of summary jurisdiction) simultaneously; it was therefore natural to hold that that remedy was the only means of enforcing the right. On the other hand, when the Police Appeals Act 1927 introduced appeals to the Home Secretary, it was merely giving an alternative (not an exclusive) remedy for a pre-existing right. (This is on the assumption, tacitly accepted by the House of Lords, that s. 220 of the Municipal Corporations Act 1882 did not exclude recourse to the courts: see below, p. 14, note 61.)

[58] [1964] A.C. 40, 81 (Lord Reid), 99–100 (Lord Evershed) and 120 (Lord Morris of Borth-y-Gest).

[59] S. A. de Smith, *Judicial Review of Administrative Action*, London, Stevens, 1959, pp. 226–227. The dicta in *Ridge* v. *Baldwin* do, however, follow a number of American cases: K. C. Davis, *Administrative Law Treatise*, Vol. IV, ss. 28.12–8.

There is, however, one situation where it is important to decide whether a decision is void or voidable, and that is where a statute takes away certiorari or some other remedy against an administrative decision. The courts assume that Parliament could not have intended to permit inferior tribunals to act beyond their jurisdiction with impunity, so that the operation of the privative clause is confined to situations where the tribunal was acting within its jurisdiction, *i.e.*, where its decision was merely voidable.[60] For these purposes, breach of the rules of natural justice is regarded as going to jurisdiction.[61]

In some cases, remedies have been granted, despite the words of the statute, without any discussion as to whether breach of natural justice renders the decision void.[62] More often the judgment is based expressly on want of jurisdiction.[63]

Most cases have concerned clauses excluding certiorari, but there is no reason why the same interpretation should not apply to clauses taking away other remedies. Thus, a member of a friendly society who had been expelled without a hearing was awarded an injunction despite a statutory provision which made decisions by the society's committee "binding and conclusive"

[60] *R.* v. *St. Albans JJ.* (1858) 22 L.J.M.C. 142; *R.* v. *Wood* (1855) 3 E. & B. 49; *R.* v. *Brickhall* (1864) 33 L.J.M.C. 156; *Ex p. Bradlaugh* (1878) 3 Q.B.D. 509; *Labour Relations Board* v. *John Bast Iron Works Ltd.* [1949] A.C. 134, 151–152.

[61] In *Colonial Bank of Australasia* v. *Willan* (1874) L.R. 5 P.C. 417, 442, the Privy Council held that the privative clause was only inoperative in the case of *manifest* defects of jurisdiction and *manifest* fraud, but analysed breach of natural justice under the heading of a defect (probably manifest) of jurisdiction. *Cf. Re Brown and Brock and the Rentals Administrator* [1925] 3 D.L.R. 824 —breach of the *audi alteram partem* principle is a manifest defect of jurisdiction.

Ridge v. *Baldwin* contains brief references to a clause of this nature—s. 220 of the Municipal Corporations Act 1882, which provided: "A conviction, order, warrant or other matter made or done by virtue of this Act shall not be quashed for want of form, and shall not . . . be removed by certiorari or otherwise into the High Court." Only two of their Lordships mentioned this section, and did not attribute much importance to it, because it was not pleaded until the case reached the House of Lords; moreover, the section was ambiguous. Lord Morris of Borth-y-Gest considered that it did not cover actions for a declaration, and that it only applied to mere "want of form," whereas the appellant's contentions raised more fundamental issues: [1964] A.C. 40, 120–121. Lord Evershed expressed doubts on the latter point, but came to no definite conclusions (*ibid.* at pp. 101–102).

[62] *Nemo judex in causa sua*: *R.* v. *Cheltenham Commissioners* (1841) 1 Q.B. 467; *R.* v. *London and North-Western Ry.* (1868) 9 L.T.(N.S.) 423 (in this case the disqualification was based on statute as well as on common law). *Audi alteram partem*: *R.* v. *Mahony* [1910] 2 I.R. 695, 742–743 (*obiter*).

[63] *Nemo judex in causa sua*: *Bruton* v. *Regina City Policeman's Association, Local No. 155* [1945] 3 D.L.R. 437 (Saskatchewan C.A.). *Audi alteram partem*: *Re Sing Kee* (1901) 8 B.C.R. 20, 22; *Canadian Northern Ry.* v. *Wilson* (1918) 43 D.L.R. 412 (Manitoba C.A.); *Re Berquist* [1925] 2 D.L.R. 696; *Re Ontario Labour Relations Board* [1951] 3 D.L.R. 162, 186–198 (Gale J.); *Board of Health for Saltfleet Township* v. *Knapman* (1956) 6 D.L.R. (2d) 81 (Canadian Supreme Court). *Aliter* if the decision is impugned merely on grounds of unreasonably short notice; in the absence of statutory rules, sufficiency of notice is left to the discretion of the inferior tribunal, and, if they err in this, it cannot go to jurisdiction: *Ex p. Hopwood* (1850) 15 Q.B. 121.

and "not removable into any court of law or restrainable by injunction"; the reason was that the decision, taken without a hearing, was beyond the committee's jurisdiction and void.[44] The case is important in another respect, too; it is one of the few English cases in a field where most of the authority comes from Canada, and it shows that the Canadian cases represent English law—an assumption which might not otherwise have been made very readily, in view of Canadian courts' fondness for defining jurisdiction in extravagant terms and for frustrating privative clauses.[45]

M. B. AKEHURST.*

[To be continued in the next issue of the *Modern Law Review*.]

[44] *Andrews* v. *Mitchell* [1905] A.C. 78, 82–83 (H.L.); followed in *Wayman* v. *Perseverance Lodge* [1917] 1 K.B. 677 (D.C.). The right to a hearing was granted by the society's rules, as well as by common law; similarly, in *Ridge* v. *Baldwin*, the decision turned upon the regulations made under the Police Act 1919 as well as upon the common law principle of *audi alteram partem*.

[45] See H. G. Batt, "Judicial Control of Administrative Acts and Decisions in Canada," unpublished LL.M. dissertation, London University, 1949, pp. 249–303; Laskin, "Certiorari to Labour Boards: The Apparent Futility of Privative Clauses" (1952) 30 Can.Bar L.Review 986; Sutherland, Comment, *ibid.* at p. 69.

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CRIMINAL JUSTICE ACT

THE principal objects of the Criminal Justice Act 1967 are to streamline court procedure, to limit magisterial discretion, to restrain the increase in the prison population and to modernise the penal system.

Proof of criminal intent

" A court or jury, in determining whether a person has committed an offence,—

(*a*) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but

(*b*) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appears proper in the circumstances."

The new section has a limited purpose and effect: it disposes of a possible interpretation of *Smith*, *i.e.*, that the presumption that a person intends the natural consequences of his act may be irrebuttable. The section in effect simply states, or perhaps restates, the proposition that an act done with the intent to cause grievous bodily harm, *i.e.*, really serious harm, which results in death constitutes murder.[1] A subjective intent to cause grievous bodily harm must still be proved, though this may be inferred. " When all is said and done, the only evidence of intent or knowledge which the prosecution can advance to discharge the burden of proof laid upon them is that which can be gathered from the acts [and words] of the accused. Having proved those acts [and words] and the surrounding circumstances, the prosecution then invite the jury to draw the natural, common-sense inference that the accused must have known of, and intended, the natural and probable consequences of what he did. And what better evidence is there of the accused's knowledge and intention than his own overt acts and deeds [and words]? "[2] The Law Commission proposal that it should be obligatory upon the prosecution to prove a subjective intent to kill to constitute murder has not been implemented. Drunkenness will be a defence in so far as it negatives an intent to perform the prohibited act. No change is made in the general criminal law affecting other offences, because *Smith* applied only to murder anyway.

[1] Lord Dilhorne (counsel for the Crown in *Smith*), Lord Parker and Lord Denning (who both sat in *Smith*) took the view that in *Smith* the jury were satisfied, *on the facts*, that the accused subjectively intended to cause grievous bodily harm.

[2] Leitch and Gibson, " Criminal Justice Act (N.I.) 1966 " (1966) 17 N.I.L.Q. 521, 526; H. Ross and J. E. Hall Williams, " The Law Commission: Imputed Criminal Intent " (1967) 30 M.L.R. 481.

Committal proceedings

Committal proceedings have long been recognised as time-consuming and potentially productive of a sense of unfairness and of risk of prejudice for the defence when reported in the press. Witnesses did not come up to proof and thus counsel's opening speech was sometimes unwittingly inaccurate; evidence was admitted at committal proceedings but rejected as inadmissible at the trial; only the prosecution case was given at committal and the press report was necessarily one-sided, and often haphazard and fortuitous; at the trial the judge always had to warn the jury to put out of their minds anything they had read about the case. Accordingly a new simplified committal procedure and restrictions on reporting, while retaining the essential principle that the accused is entitled to know in advance the case he has to meet at the trial, and to have press publicity if he wishes, are very welcome. Where the accused is legally represented committal may now take place formally by consent on the basis of written statements, served on the defence before the hearing, which will not even be read out aloud in court nor even read by the magistrates if the defence does not wish the prosecution witnesses to be called. The new practice will act as a stimulus to the granting of legal aid, and this is very desirable because in a case of any seriousness an accused ought to be represented at the earliest possible stage in proceedings. The defence will have to be prepared at an earlier stage. The written statements given at the committal proceedings will contain a declaration that the maker is aware that any knowingly false statement renders him liable to a penalty akin to that of perjury.

One of the difficulties in the past was that the prosecution adduced sufficient evidence to secure the committal and then disclosed the rest of its case by notices of additional evidence, often served at a late stage. It is a matter for regret that the Act does not require the prosecution to disclose at committal all the statements in its possession. The duty on the prosecution is to disclose the names and addresses of any persons not called who in the judgment of the prosecution may be able to assist the defence. A much fairer approach would be to allow the defence access to the files or at least to all statements taken by the police in the course of the investigations, subject to a privilege of non-disclosure granted by the court in appropriate cases. The advantage of the new system may be that where there is committal on the papers the defence may be supplied with the statement originally taken from the witness and not merely the version given by the witness at committal proceedings. However, some prosecuting solicitors have said that they intend to " edit " statements, to call their important witnesses in person at the committal in order to give them a " trial run " and to use committal on the papers only in clear, uncomplicated cases in which the accused indicates an intention to plead guilty.

It is unlikely that the press will continue to attend committal

proceedings, because the proceedings will in most cases amount to formal committal by consent on the papers and in any event the press and other communication media are now restricted from publishing the evidence given by the prosecution and may only publish the formal matters such as the name and address of the accused and the offence with which he is charged, unless the accused applies for the removal of the restriction. The right of the press to report the trial itself is unaffected. The committal proceedings are not part of the trial, merely a preliminary investigatory or administrative process. As a corollary to the restrictions on reporting, committal proceedings must take place in open court unless it appears to the magistrates that the ends of justice would not be served by their sitting in open court, *e.g.*, national security or intimidation of witnesses. Committal on the papers will mean that there will be little for the public to see and hear. The result of all committal proceedings must be posted up in writing in a public part of the court-house.

Bail [8]

Bail ought to be granted unless there is likelihood that the accused will fail to appear at the trial, or commit further offences or interfere with witnesses. These common law principles remain sound and workable. The difficulty has been that they have not always been understood and applied by magistrates. In order to ensure that bail is granted in the less serious cases, *i.e.*, those triable summarily and punishable by not more than six months' imprisonment, the court is now required as a mandatory duty to grant bail, subject to an arbitrary list of exceptions, *e.g.*, previous imprisonment or Borstal, violence, firearm offence, sex, no fixed abode, previous breach of condition of bail, alleged to have committed offence whilst on bail, when the discretionary principles continue to apply. Bail must be granted to a young person previously sentenced to a detention centre because he is believed not to have been conditioned to prison as he might have been if previously sentenced to Borstal or prison. Legislation by detailed categorisation compares unfavourably with legislation by general principle. Limiting magisterial discretion is not a sound approach to criminal procedure. Conditions may now lawfully be imposed (regularising the previous practice) and the police may arrest an accused on bail on reasonable suspicion of a likely failure to appear at the trial or breach of any other condition, two useful improvements designed to remove inhibitions upon the granting of bail. The High Court may admit to bail any person who could have been admitted

[8] *Justice Joint Working Party on Bail and Remand in Custody*, December 1966; Michael Zander, "Bail: A Reappraisal" [1967] Crim.L.R. at pp. 25–39, 100–110 and 128–142; Alec Samuels, "Bail Principles" (1966) 116 N.L.J. 1269; Kevin Tierney, "Grant of Bail" (1967) 117 N.L.J. 919; Michael Zander, "Discovering Bail Applicants' Background" (1967) 117 N.L.J. 981.

to bail by the magistrates' court and may vary any conditions imposed. Committal to quarter sessions for sentence may be on bail; in 1965 out of 8,500 committals 2,000 did not receive custodial sentences. Power to impose a sanction for jumping bail as a deterrent to those few accused who do fail to appear at the trial and power for the prosecution to appeal against the grant of bail would have been further useful improvements. It was unconvincingly argued that the new power to arrest a person on bail would be a sufficient sanction, and that in our system the prosecution cannot appeal. Legal aid should have been made available for bail applications only. Disclosure of previous convictions is entirely appropriate in bail applications, but a magistrate involved in any such application must not sit at the trial, in order to avoid any suggestion of prejudice. Time spent in custody before as well as after committal now counts towards the computation of sentence so that refusal of bail in many cases will not extend the time ultimately to be spent in custody. In the past many people have been refused bail, often due to no evidence of " community roots " being placed before the magistrates, and have been subsequently either acquitted or given a non-custodial sentence.

Legal aid

Legal aid in criminal cases has been placed upon a contributory basis analogous to the civil scheme. The contributory principle aroused considerable opposition.[4] It was argued that accused persons would be deterred from applying for legal aid with the result that there would be less representation and the trial would be prolonged. The accused person has no option but to be involved in the proceedings, unlike the civil plaintiff who seeks legal aid. Under the civil scheme the legally aided party knows his maximum contribution in advance, whereas in the criminal scheme he will not know the amount of his contribution until the end of the case, a rather uncertain and anxious situation. A person sent to prison is unlikely to be able to make a contribution, and a person permitted to remain at liberty might impose financial suffering upon his family in trying to meet the contribution. To require the acquitted accused to pay might be said to be adding insult to injury. If any case of abuse were to come to light the sanction which the court could and should exercise would be to order the accused to contribute to the costs of the prosecution. Saving public money at the cost of injustice would be a regrettable policy. However, the arguments in favour of the contributory scheme were, it is submitted, much more compelling. Social justice and contemporary thinking in social services dictate that public money should only go to those

[4] Michael Zander, " Contributory Criminal Legal Aid " (1967) 117 N.L.J. 247; Alec Samuels, " Contributory Criminal Legal Aid " (1967) 117 N.L.J. 467; Michael Zander, " Legal Aid in Criminal Proceedings " (1968) 29 M.L.R. 630; Tom Sargant, " Legal Aid in Criminal Appeals " (1967) 117 N.L.J. 1067.

in genuine need, especially in times of economic stringency. The contributory scheme will enable legal aid to be given to those who hitherto have just missed legal aid because they were reasonably well off, although not wealthy; and the costs of a long-contested case might easily strain the resources of even the reasonably well off. The speed of the criminal process makes it impossible to operate the civil system of pre-trial assessment of maximum contributions and instalments payable, although down payments may be required from the accused. The clerk of the court will in practice have a fairly good idea of the likely cost involved and will tell the accused, as will his own legal advisers as the matter progresses. He may appeal to the Supplementary Benefits Commission for a review of the findings of the court as to his means and the court must then reconsider the matter. The new scheme will be administered in a broad, reasonable and fair manner. The uncertainty element can be exaggerated; even the private client is faced with a measure of uncertainty as to costs. The sanction of awarding costs to the prosecution in the event of abuse would not have been satisfactory because the costs of prosecution and defence are often not comparable. The case of the acquitted accused will be treated on its merits and it may be that contributions will be waived and a sum awarded out of public funds.

Criminal legal aid is now contained in a single modern statutory code. Basically the traditional principles will be applied, although it is to be hoped that the criteria for granting legal aid as propounded in the Widgery Report will become more widely known, understood and applied.[5] The legal advice scheme enables the accused to visit a solicitor at a very early stage to seek advice on his case for a most modest fee, and advice may include information on how to apply for legal aid. Counsel should not normally appear in a magistrates' court in legal aid cases, except in the case of an indictable offence where the circumstances make the case unusually grave or difficult. This limited exception of an indictable offence is arbitrary, illogical and unnecessary, because some summary cases are extremely long and complicated in point of law. The practice of limiting a certificate to counsel only was much criticised, because counsel cannot interview witnesses and obtain copies of documents. However, it is anticipated that this practice will decline and be used only in cases of urgency, *e.g.*, when the accused appears at the trial at quarter sessions without representation. It is hoped that normally legal aid will be granted on committal, for solicitor and counsel, or by quarter sessions on written or personal application before the day of the hearing. In any event an application by counsel for an adjournment may be sympathetically considered in a proper case. The absence of any form of appeal against a refusal of legal aid, except by way of renewal of application, is

[5] *Report of the Committee on Legal Aid in Criminal Proceedings*, Chairman, Widgery J., Cmnd. 2934, pp. 97–98.

perhaps to be regretted. Counsel only, without the solicitor, for appeals to the Court of Appeal may be justified if the appeal is concerned principally with a point of law and all the relevant papers are before the court, though the registrar will communicate with any solicitor who was acting in the court below and invite him to furnish any papers in his possession. Collection of contributions is the responsibility of the magistrates' clerk whose court heard or committed the case. In the past it has been doubtful whether the scope of a legal aid certificate covered advice on prospects of appeal and assistance in the drafting of a notice to appeal. The new code sensibly lays it down as a mandatory duty that counsel acting under a certificate must advise upon the prospects of appeal and draft the notice of appeal where appropriate, and fees will be payable accordingly. It would have been even better if the certificate had been extended to cover a free short transcript and application for leave to appeal. In leaving the convicted person to fumble with his own notice of appeal the legal profession has not advanced his interests nor facilitated the task of the judges in the Court of Appeal, and it is welcome to see the emergence of a general ethical duty upon the lawyer to advise and assist in the matter of an appeal.

Evidence [*]

Much of the evidence given by the prosecution and the defence is often of a purely formal and non-controversial nature. Calling the policeman who measured the road or the photographer who took the photograph of the vehicles or the chemist who carried out the analysis is often a waste of time and public money. Accordingly written statements by prosecution witnesses are now to be admissible, subject to the right of the defence to object within seven days of service of the copy statement and to insist upon the witness himself being called. Written statements must be read aloud at the trial unless the judge otherwise directs, in which case a summary must be given, *e.g.*, a long technical analysis may be briefly summarised by giving the conclusions. Judicial insistence on a summary in the face of defence objection would seem to be a promising ground for appeal. Similarly there are often undisputed matters which the defence are very ready to admit, *e.g.*, the identity of the deceased, and accordingly a formal admission is to be conclusive evidence of the fact admitted. Pre-trial admissions are valid only if approved by the accused's lawyer, whereas admissions may be made in court even by the unrepresented accused, an unfortunate provision. It was argued that the unrepresented accused ought never to be permitted to make an admission, apart from the plea of guilty, because he might not appreciate the significance of his action. However, nowadays it is rare for an accused to appear unrepresented on

[*] *Criminal Law Revision Committee, 9th Report, Evidence*, Cmnd. 3145, November 1966.

indictment, and in any event the court will protect him. An admission may be withdrawn with the consent of the court, *e.g.*, a negligent solicitor might make a damaging admission quite contrary to the wishes, instructions and interests of the accused.

Alibi

The " sprung alibi " has been a most unsatisfactory aspect of our system of criminal trial. It is therefore encouraging that we are now moving away from the idea that the defence may keep everything up their sleeve until the trial, the right to silence, towards the idea that the defence should disclose its hand before the trial. The criminal trial should be a fairly conducted inquiry into the truth, not a forensic game. Within seven days of committal, a very short period, the accused must give notice to the prosecution of the name and address of any proposed alibi witness, or, if the name and address cannot be given, any information in his possession which might be of assistance in finding the witness; and any subsequent discovery of the name and address must be disclosed. There is no obligation on the defence to disclose the proofs or statements taken from the witness. Whereas the new rule is sound in principle, it certainly creates difficult problems. What is an alibi? The Act says that evidence in support of an alibi means evidence tending to show that by reason of the presence of the defendant at a particular place or in a particular area at a particular time he was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission. Thus a straight denial, " I was not there," or " It's a case of mistaken identity," is not an alibi, unless the accused intends to say where he was, unlike the statement " I was at the ' Dog and Duck.' "

It was argued that potential witnesses may be deterred from offering to give evidence for the defence to support an alibi in view of the fact that the police will almost certainly come round to interview them before the trial. There is no property in a witness. An undertaking has been given to the effect that wherever possible the defence solicitor will be notified in advance of any such interview so as to have an opportunity to be present if he wishes. If as a result of the interview the prosecution wish to call rebutting evidence they will have to give notice of additional evidence but there is apparently no duty to disclose information discovered about the witness or to disclose a copy of any statement taken.[7] For example, the witness, ignorant and illiterate, may make a statement rather at variance with the statement subsequently made to the defence solicitor and repeated at the trial, and prosecuting counsel will then have some useful ammunition

[7] Alec Samuels, " Prosecution Evidence for the Defence " (1966) 116 N.L.J. 193; J. E. Adams, " Pre-Trial Discovery, a Memorandum by the Council of the Law Society " [1966] Crim.L.R. 602 at pp. 605–606.

for cross-examination. Similarly it is to be hoped that any criminal convictions discovered by the police will be disclosed to the defence. Subject to the direction of the judge, the prosecution may adduce rebutting evidence after evidence of alibi has been given, *e.g.*, after the defence case or at a retrial following a disagreement,[8] though it may be expected that rebutting evidence will have to be given as part of the prosecution case.

Generally it may be anticipated that the police will check up on any alibi defence put forward. However, there is no legal duty to do so, and there have been cases in which it has been alleged that the police have not troubled to do so. It is submitted that it ought to be recognised to be their duty to investigate every alibi advanced, because the defence lacks the resources for investigation available to the police. Naturally failure to investigate a notified alibi will lead to damaging criticism in cross-examination.

The sanction for failing to give notice is that without the leave of the court the accused may not adduce the evidence in support of an alibi. This sanction, refusing to allow the defence to give relevant evidence, is most severe. It might have been better to have permitted both judge and prosecuting counsel to have commented adversely upon the failure to make pre-trial disclosure. It can never be right to deprive an accused of the opportunity to present his defence. The new procedure applies to the unrepresented accused, and represents another powerful reason for granting legal aid at an early stage to virtually all accused persons sent for trial, subject to means, especially where it seems likely that an alibi will be raised at the trial. There is a statutory duty on the committing court to warn the accused of the duty to give notice of a defence of alibi, failure to do so preventing the prohibition from operating.

The new alibi rules do not apply to summary trials because alibi is not a common defence in such cases and in any event an adjournment is more practicable.

Jury

"In a case tried some time ago in the Central Criminal Court, out of a panel of thirty-five there were twelve with records of crime; and when, as a result of many challenges, another twenty-four names were supplied, it was found that eight of these had criminal records. And in a much more recent case the startling discovery was made that out of a panel of 845 names no fewer than 124 had convictions for crime recorded against them."[9]

A person who during the preceding ten years has been sentenced to imprisonment for three months or more or at any time to a sentence of five years' imprisonment or more is now very properly

[8] J. D. Caswell, Q.C., "Lance for Liberty." *Loughans* v. *Odhams Press*, *The Times*, February 14, 1968.

[9] Lord Parker C.J., *Hansard*, House of Lords, Vol. 283, col. 842, June 6, 1967.

disqualified.[10] A warning notice sent with the jury summons will explain the law and the disqualified person will be able to secure the withdrawal of the summons without publicity.

Majority verdicts [11]

A jury in criminal proceedings may return a majority verdict, 10:2 or 11:1, if it has had at least two hours for deliberation or such longer period as the court thinks reasonable having regard to the nature and complexity of the case.

In an age of highly organised crime there is evidence of bribery and intimidation ("nobbling") of jurors in important cases involving professional criminals ("the big fish"), leading to disagreements. Complaints have been made by judges and barristers. For the protection of society and the vindication of justice the guilty cannot be allowed to escape conviction. Any step which increases the likelihood of convicting the guilty will improve police morale. Naturally detection of nobbling is not easy, but a number of cases have been known to the police in recent years. The juror who has been approached may be unwilling to give evidence in proceedings against the nobbler, so sanctions cannot readily be applied. He may well fear for his family. Under a 10:2 system it is unlikely that three jurors can be successfully nobbled. In some cases the police had to have seventy or eighty men on duty guarding jurors in a long and important trial. Disagreements involve waste of time, money and judge power, especially in a protracted fraud or similar case, whereas a majority system virtually ensures a verdict and obviates the necessity for a second trial. A second trial very rarely results in a second disagreement, indicative perhaps of some unusual factor at work in the first jury. Majority decisions are taken by benches of magistrates, county quarter sessions and the Court of Appeal. Many accused persons entitled to trial by jury (unanimity) elect for summary trial (majority). Unanimity is too much to expect in a collective decision-making process which involves the subjective task of weighing the evidence of fallible human witnesses speaking of the past. The principle that the prosecution must prove the guilt of the accused beyond all reasonable doubt remains unaffected, for that duty is morally to convince those who are empowered to decide, *i.e.*, the majority. Twelve is a number wrapped in mythology, not logic; ten is a substantial number; seven was accepted during the war without any evidence of hardship. A perverse juror, in the form of an antagonistic motorist hostile to police evidence and to strong circumstantial evidence, is perhaps more likely to be found on a jury today than formerly. Many mentally ill persons are today permitted to

[10] The fact that a disqualified person sits as a juror does not invalidate the trial: *R.* v. *Kelly* [1950] 2 K.B. 164.

[11] *Practice Direction on Majority Verdicts* [1967] 1 W.L.R. 1198; [1967] 3 All E.R. 187 (C.A.).

remain in the community on drugs. There is no reason to anticipate an increase in the number of disagreements. Judges will still urge unanimity, and there is the two-hour safeguard to ensure discussion in the jury room. In England there exists in practice no effective system of inquiry into the background of the jury (*voire dire*) to facilitate challenge to eliminate the potentially unsuitable jurors. The apparent proclivity of the jury to unanimity in the past may have stemmed from its relatively homogeneous background in the middle class, a homogeneity likely to be weakened with an extended franchise in prospect. Challenge to intelligent-looking jurors is not uncommon. A majority of the judges supported the majority principle.[12] An accused person would surely prefer an acquittal 10:2 than a disagreement and a retrial. Many foreign and common law systems, notably Scotland and former British territories, operate a majority system to their own satisfaction and do not intend to change.

The opposition to majority verdicts was, it is submitted, much more compelling. The evidence of nobbling was infinitesimal, six cases in three years in London and five cases in the provinces over a similar period. Suddenly, without any research or inquiry, to destroy the unanimity principle was an ill-considered, panic decision which can only endanger the liberty and reputation of the innocent. This is not to approve of our pathological hostility to impartial scholarly inquiry into a social institution of immense importance in national and individual life, *e.g.*, by means of " bugging " with safeguards. The unanimity concept has been of immense value in promoting public confidence in English criminal justice and to sacrifice this in the absence of overwhelming evidence of need for change is unforgivable. The destruction of the corporate feeling of the jury may lead to an increased number of disagreements because in effect non-conformity is now encouraged. The power of a minority to argue and persuade will inevitably be weakened, despite the arbitrary and artificial two-hour safeguard. Having reached a 10:2 decision the jury will have to sit out time. It might have been a lesser evil to have given the judge an absolute discretion to accept a majority verdict where he was satisfied in the particular circumstances that it was appropriate, though with over 850 people empowered to try cases on indictment there might have been some risk of variation in practice.

" Juries which begin with an overwhelming majority in either direction are not likely to hang. It requires a massive minority of four or five jurors at the first vote to develop the likelihood of a hung jury." [13] The secrecy of the jury room and the principle of the sovereign verdict may be endangered because the press and

[12] The Lord Chief Justice found that out of 87 Q.B.D. judges 25 were in favour, eight against, two did not know, one supported an experimental period only and one favoured the principle if the trial last four days or more: House of Commons, Vol. 745, col. 1779, April 26, 1967.

[13] Kalven and Zeisel, *The American Jury*, p. 462.

others may seek to discover who were the minority jurors and why they dissented, indeed the minority jurors may be anxious publicly to explain and justify their dissent.[14] Following a majority direction a verdict of not guilty is not inquired into, a naïve attempt to create a situation in which it is not known for certain that the acquittal is not unanimous, whereas a verdict of guilty must have the majority explicitly spelt out. Public confidence will be weakened at a critical period in English criminal justice. In practice the burden of proof will be believed to have been lowered when only ten jurors need to be convinced of guilt. A verdict of murder by majority is anathema. The danger of wrongful conviction in identity cases even with the unanimity rule is widely recognised; evidence of identification is not required as a matter of law to be corroborated. It will be interesting to see if appeals in majority convictions are more successful than in unanimous convictions.[15] The innocent will suffer an unfortunate injury or slur to reputation if acquittal is obviously 10:2 instead of 12:0. Even during the war the jury, although reduced in size, still had to be unanimous. The Queen's Bench judges were not overwhelmingly in favour of the majority principle, and it appeared that recorders and chairmen at quarter sessions and the legal profession generally were mostly opposed to the new principle. A change in the law which does not command general approval is unlikely to be very effective. Nothing was heard of majority verdicts until capital punishment was abolished, yet a change in sentence cannot affect the principles upon which guilt or innocence are to be determined. The Scottish analogy is misleading, because in a serious case the jury consists of fifteen members and stringent rules on corroboration place a much heavier burden of proof upon the prosecution.

Nobbling cannot be denied or ignored. But the majority principle will simply mean that more jurors will need to be nobbled, a more inconvenient and expensive task but not impossible for a criminal syndicate. Greater penalties for nobbling are indicated.[16] It should not be assumed that the juror who is improperly approached will necessarily accept the proffered bribe or fail to report the matter to the police. Other remedies should have been tried first, such as a more careful check upon lists of jurors in order to render the right of challenge more effective, with concomitant security precautions[17]; and a more careful

[14] Devlin, *Trial by Jury*, pp. 55–56.

[15] *West Indian Electric* v. *Roberts* [1920] A.C. 1025 at p. 1028, Lord Buckmaster (P.C.)—civil case, holding that majority decision carries equal weight to unanimous decision. Lord Parker C.J. said: "I have no doubt that in the case of a majority verdict it is something that the Court of Appeal will take into account in deciding whether it is safe to allow the verdict to stand.": *Hansard*, House of Lords, Vol. 288. col. 344, June 6, 1967.

[16] Though in *R.* v. *Richardson*, *The Times*, July 21, 1967, on a conviction for conspiracy to pervert the course of public justice by attempting to interfere with a juror O'Connor J. imposed sentences of 12 years and eight years respectively on two prisoners.

[17] Morris Committee Report, Cmnd. 2627, April 1965, para. 354.

identification of jurors would reduce the risk of personation. A more rigorous reform of the rules of evidence to facilitate a proper conviction would also help. Police protection of jurors will still be necessary, although the " big fish " trials can easily be identified, and anyway the cost of police protection amounts to a small price to pay for the preservation of a fundamental constitutional safeguard. The sprung alibi is gone. The tighter disqualification rules for excluding ex-prisoners from the jury should prove to be a useful safeguard. Any risks inherent in widening the franchise should be dealt with when the franchise is in fact widened. An acquittal rate of 40 per cent. in contested cases on indictment narrows down to 16 per cent. of those tried on indictment and to 7 per cent. in robbery with violence and similar offences, a not particularly high or disturbing rate. After all, some of those acquitted may be innocent. Disagreements are not to be encouraged, but they are not necessarily disastrous. The absence of disagreements would give cause for alarm; too many disagreements would also give cause for alarm. But the occasional disagreement must be expected and indeed is evidence of the conscientious discharge of its duty by the jury.[18] A minority of two in, say, a complex conspiracy case ought not to be assumed to be stupid, or perverse, or corrupt. The figures show that disagreements occur only in about 4 per cent, of contested cases [19] and on retrial the figures are 4:2:1 for conviction, acquittal, disagreement. In 1965 at the Central Criminal Court there were forty-nine disagreements, on retrial twenty-five convictions, fourteen acquittals and nine disagreements; in 1966 in 1,180 cases fifty-one disagreements, on retrial 22:25:4. Conviction may be more easily obtained on retrial because the prosecution is aware of the defence evidence. The nobbled juror can only stand out for disagreement, he cannot force an acquittal. The disadvantage of retrial may be justified in order to retain the unanimity principle inviolate. Lord Devlin said [20]: " The sense of satisfaction obtainable from complete unanimity is itself a valuable thing and it would be sacrificed if even one dissentient was overruled. Since no one really knows how the jury works or indeed can satisfactorily explain to a theorist why it works at all, it is wise not to tamper with it until the need for alteration is shown to be overwhelming."

Committal for sentence

Because of the ever-increasing jurisdiction of magistrates' courts to deal with more serious offences,[21] the practice of committing to

[18] *Ibid.* paras. 357–358.
[19] *Hansard*, House of Commons, Vol. 734, col. 9, W.A.; *ibid.* col. 157, W.A.
[20] Hamlyn Lectures, p. 57. *The Times* said (April 4, 1967): " This is not rational reform. This is fumbling in the dark." Lord Stow Hill called the majority principle " jurisprudential vandalism ": *Hansard*, House of Lords, Vol. 283, col. 813, June 6, 1967.
[21] The Act gives a wider jurisdiction in forgery to magistrates.

quarter sessions for sentence may increase, although the power to impose heavier fines may to some extent counteract this tendency. A few amendments have been made. When an errant motorist is committed for sentence the question of disqualification (not technically a sentence) may be left to quarter sessions, subject to the power to make a discretionary order for interim disqualification. The old rule was that if quarter sessions imposed a sentence which was greater than the magistrates could impose, then an appeal would lie to the Court of Appeal, but not if the sentence was within the powers of the magistrates. The new rule is that an appeal will lie to the Court of Appeal following committal for sentence (as opposed to the case of an appeal to quarter sessions from a magistrates' court) where the aggregate total of sentences is six months or more,[22] a deportation order is made, or a Borstal order, or a disqualification order, or following committal under the Mental Health Act 1959, or if an offender is sentenced for a breach of probation or conditional discharge for the original offence. It would have been simpler and preferable to have given a right to apply to the Court of Appeal for leave to appeal against sentence in the case of every sentence imposed by quarter sessions. The reason for restricting the right at present to certain complicated and limited categories is essentially the shortage of judge power in the Court of Appeal; the remedy for this is more judges, not restrictions upon appeals.

Fines

The fine is in many ways the most important weapon in the sentencer's armoury, and likely to be used more and more in the future in view of the higher maxima and the emphasis upon the need to avoid prison. In recognition of inflation, and in some cases of a new assessment of the gravity of an offence, the maximum fine which a magistrates' court may normally impose has been raised from £100 to £400. The big problem has been the 12,000 defaulters who have ended up in prison every year, 45 per cent. of whom have never been to prison before and 40 per cent. of whom buy themselves out, thus showing that they or their friends can if necessary find the money.[23] The laudable new policy is to diversify the method of fine collection and to use committal to prison only as a last resort. At the time of the imposition of the fine a magistrates' court may not issue a warrant of commitment or fix a term of imprisonment in default unless in the case of an offence punishable with imprisonment the offender appears to

[22] Reversing *R.* v. *Finnan* [1967] Crim.L.R. 78; December 19, 1966; *R.* v. *Nutbeam, The Times*, June 30, 1967; *R.* v. *Laverne, The Times*, June 30, 1967 (C.A.); *R.* v. *Drummond, The Times*, October 30, 1967 (C.A.).

[23] In 1964 10,281 fine defaulters were committed to prison, of whom 4,488 had never previously been to a penal institution and of whom 1,978 had no previous conviction: *Hansard*, House of Commons, Vol. 748, cols. 282–284, written answer.

have sufficient means to pay forthwith or is of no fixed abode or is being sentenced to immediate custodial treatment. Time to pay is not to be refused because of the gravity of the offence or the record of the offender. On default the offender must be brought back to the court and only after a means inquiry may committal take place, and even then only if the offender is present and the court is satisfied that the offender has the means to pay forthwith or the court has considered or tried all other methods of enforcing payment and it appears that they are inappropriate or unsuccessful. Reasons must always be given for committal. All this will mean extra work for the magistrates' clerk and his staff. There is a useful power to remit fines having regard to any change of circumstances, *e.g.*, loss of employment, or release from a custodial sentence. The power to order periodical payments continues. It has been suggested that in future the courts will probably make more use of their power to search the offender, to order one day's detention and, at the appropriate stage, to suspend warrants for commitment on conditions; and will be quicker off the mark in issuing means inquiry process in the case of the offender who clearly can pay but does not bring his money to court. The two new methods of enforcement made available are civil process for debt, *e.g.*, by action in the High Court by way of bankruptcy or garnishee proceedings on a bank account or company paying dividends, a process rarely likely to be fruitful, and, secondly, attachment of earnings. The attachment of earnings procedure has proved useless with the casual worker because a fresh order needs to be made on every change of employer. P.A.Y.E. deduction is the answer. Also the procedure involves the disclosure of a criminal conviction to the employer. Quarter sessions and assizes must continue to fix a term of imprisonment in default. The justification must be that in the higher court the offence is likely to be more serious and the fine much heavier; also the fine is comparatively rare in the higher courts, whereas it is commonplace in the magistrates' courts. The suspended fine has not yet made its appearance; nor is there any discount for prompt payment.

The suspended sentence

The suspended sentence, long known in other jurisdictions, is introduced into English practice for the first time. A sentence of not more than six months must be suspended, unless the offender has previously been to prison or Borstal, or the sentence is being passed for a breach of probation or conditional discharge or the offence consists of violence or threat of violence, or in connection with a firearm or offensive weapon or explosives, or for indecency towards a person under sixteen, or at the time of the commission of the offence for which the sentence is passed the offender was already subject to a suspended sentence. In these exceptional cases suspension is permissive, not mandatory. For sentences of from

six months to two years suspension is discretionary. The period of suspension must be not less than one year and not more than three years. The effect of the suspended sentence must be explained to the offender in ordinary language. If the offender subject to a suspended sentence commits a further offence the court dealing with him for the further offence must activate the suspended sentence unless of opinion that it would be unjust to do so in view of all the circumstances which have arisen since the suspended sentence was passed, including the facts of the subsequent offence, in which case it may impose a different sentence or indeed none at all. If Borstal is imposed for the subsequent offence the sentence for the original offence is not activated because prison would not be an appropriate concurrent or consecutive sentence with a training sentence. In appropriate cases a suspended prison sentence may be activated in the form of a detention centre order. In order to facilitate follow-up, activations must be reported back to the original court. The Minister has the power to extend the mandatory system to sentences up to twelve months and to a person not recently in prison.

Three interrelated issues of principle are involved: whether the suspended sentence is a sound concept, whether it should be mandatory in certain circumstances, and whether it should be mandatorily activated in the event of a further offence.

Of some 45,000 annual receptions in prison some 22,000 received less than six months' imprisonment, and of those some 7,500 were received for the first time, and of those some 6,000 were non-violent, non-sex offenders. The short sentence seriously interferes with the work of the prison service in dealing with the medium- and long-term prisoners, no rehabilitative work can be done in six months or less and the deterrent effect of prison for the future may be much reduced by a short-term acclimatising sojourn, removing the deterrent of the unknown. The family suffers hardship. The imposition of the specific term of imprisonment rather than vague conditions in a discharge may have the desired psychological effect upon the offender, which the apparently milder sentences of conditional discharge and probation may not have, as they may be looked upon as a "let-off." The court appearance in itself may be a sufficiently traumatic experience. If there is no further trouble during the period of suspension the success will have justified the suspension without cost to the public; if there is further trouble the suspended sentence will be activated and the offender will bear his punishment anyway. The mandatory nature of the suspension of short sentences of six months or less will ensure a measure of consistency or uniformity of sentencing, and the exceptions from the mandatory rule recognise that certain offences arouse special public alarm and therefore may not be suitable for freedom for the offender. The first offender convicted of a relatively minor drug offence may be suitable for suspended

sentence. The motoring offender rarely requires the supervision of a probation officer. The pressure on the probation service is such that a careful use of the limited resources of that service is essential. The probation service, a predominantly young man service, is not always able to provide very effective assistance to the middle-aged and old offender. The justification for the mandatory sentence is that a discretion conferred upon the courts is often not exercised, as in the case of the First Offenders Act 1958, and the type of offender upon whom it will be imposed will be a person who has not previously been to prison or Borstal, has not been involved in a crime involving violence or sex, and whose offence was not very serious, *e.g.*, a relatively minor property offender. An offender is not eligible for a second suspended sentence, he has only one chance.

It is submitted, however, that the suspended sentence, particularly the mandatory suspended sentence, is a bad concept. In a personalised system of justice the sentencing court should be given as wide a discretion as possible. Mandatory sentences reflect upon the competence of the courts and suggest a lack of public confidence in them. Instruction and guidance for magistrates should have been tried first. Upon the commission of a further offence a virtually automatic activation of the suspended sentence might well be manifestly inappropriate in the new situation; or the exercise of a discretion not to activate will show the original threat to have been empty. A conviction for being drunk and disorderly on the last day of a three-year suspension ought not to activate a six months' sentence for larceny. Mandatory suspension may induce magistrates to commit more frequently to quarter sessions for sentence, and quarter sessions may be tempted to impose unnecessary sentences in excess of six months; or very large fines may be imposed. Suspension does not apply to sentences imposed upon those under twenty-one. Two young men, eighteen and twenty-two, are convicted of a joint criminal enterprise. The eighteen-year-old is sent to detention centre for three months. The twenty-two-year-old receives three months' imprisonment, which is mandatorily suspended. Is this justice? The short sentence is not necessarily unsatisfactory in every case, *e.g.*, a property offender such as a telephone vandal may be very amenable to an immediate sentence. The offence may have been quite serious, *e.g.*, drug trafficking. Many offenders sent to prison for the first time never come before the courts again. The suspended sentence may simply postpone the inevitable day of reception into prison, and on that day the sentence to be served will be longer than it need have been because it will represent the aggregate sentences for two consecutive offences, the second of which might have been prevented. Postponing prison may not be a kindness for the offender. In imposing a conditional discharge the judge usually spells out the sentence he had in mind and which the offender may expect upon

breach, so that there is no illusion. The more leniently an accused has been treated in the past, *i.e.*, avoiding prison, the greater his chances of a suspended sentence. In some cases, *e.g.*, taking and driving away and driving whilst disqualified, there may come a point when a prison sentence is the only possible sentence. Reducing the prison population cannot be justified at the expense of law and order. The institution of the suspended sentence may prove detrimental to probation. A court imposing a suspended sentence for one offence may not impose probation for another on the same occasion. There is no substitute for probation where supervision, support and control is necessary, yet the courts may be tempted to relieve the probation service by using suspension instead of ministering to the needs of the offender. A substantial increase in the resources for the probation service would have been a more constructive policy. The suspended sentence does not even involve the not inconsiderable discipline involved in probation, *e.g.*, regular reporting and regular accountability. A discretionary suspended sentence would have been much more appropriate as a beginning.

The exceptions from the mandatory suspension are illogical, anomalous and inappropriate. Offenders guilty of violence or indecency may well be the last persons to be denied the possibility of rehabilitation in the community; and similarly the offender who is in breach of probation may, despite a regrettable lapse, nevertheless be an excellent risk for continued liberty instead of incarceration. Rehabilitation is a painful process, not to be achieved overnight without occasional lapses and setbacks. The " one chance only " approach is too rigid. The conditional discharge, which may now run for up to three years, is a more flexible instrument of penal policy. The suspended sentence might actually increase the number of offenders received into prison, or at least cause to be included in the receptions persons who hitherto would have avoided this, because the courts may casually impose a short prison sentence in the knowledge that it will be suspended and therefore inoperative, only to find that a further offence, however minor or technical, is committed during the period of suspension and the original sentence of imprisonment in fact has to be served.[24]

Israeli experience with the suspended sentence was that more and heavier prison sentences were imposed, and that there were ill-feelings among the judges when it came to activating the sentences. Recognising that for success suspension presupposes maturity and self-control in the offender not to commit further offences which are often not present, it has been made possible to attach a probation order to a suspension and to extend the original period of suspension in appropriate cases.[25]

[24] This suggestion was put to me by my colleague Stephen White.

[25] D. Reifen, "New Ventures of Law Enforcement in Israel" (1967) 58 Journal of Crim. Law, Criminology and Pol.Sci. 70 at pp. 72–78.

Probation and after-care

There is little that legislation can do for the probation and after-care service, which needs more men, better training, higher pay, increased status and the allocation of greater resources, but some useful improvements have been made. The court may disqualify and place on probation at the same time, a recognition of the fact that the motoring offender is not a special sort of offender but one who may need support and control; and discussion on how to come to terms with disqualification may prove a useful " lead-in " for the officer seeking to establish a relationship. The maximum fine for a breach of probation is increased from £10 to £20, though a fine is rarely a suitable method of dealing with a breach. All questions of discharge, amendment or breach now come before the supervising court and not the court which originally imposed the order because the supervising court is likely to be in the probationer's locality and better able to judge the effect of changing circumstances. Compulsory review of residence conditions has been abolished. An order for conditional discharge, a parallel to probation, may now run for up to three years. A probation order may be converted into a conditional discharge. For example, a probationer may have responded so well that further support and control are not necessary, but the existence of a live condition may provide a necessary restraint; or the relationship with the officer may be poor, even perhaps a dangerous irritant likely to be crimogenic, but there is no likelihood of a further offence if there is some live deterrent. A probationer need no longer necessarily be supervised by a probation officer of the same sex; the matter will be dealt with by administrative arrangement by the principal probation officer. Reflecting the increasing emphasis upon after-care the probation and after-care committees are to have not more than one-third of their number co-opted from non-magistrates having special experience in after-care; and the recorder is to sit *ex officio*. The Home Secretary is given power to prohibit the imposition of a custodial sentence in the absence of a social inquiry report, though this power is happily largely superfluous. Failure to obtain a social inquiry report will not invalidate the sentence, but on appeal the court would have to consider such a report in determining whether to alter the sentence.

Drunks

The drunk represents a social rather than a criminal problem. Fine and imprisonment are known to be useless for rehabilitative purposes. The increase in the maximum fine to £50 seems to be a pointless exercise. Five thousand committals annually, including 4,000 fine defaulters (though these figures include many repetitive offenders), show the size of the problem. An experiment at Spring Hill Open Prison starting in October 1965 with over a thousand short-sentence drunks produced the depressing finding that most of them

were medically untreatable. The " dry out and clean up " clinic at Pentonville does what it can. Probation with a condition of twelve months' residence or mental treatment might meet the situation in cases where the probation and welfare services could cope, but the chances of the drunk remaining at the indicated place are remote. A joint working party is investigating the problem and the Home Office is pressing ahead with plans to make hostels available, though this policy may not solve the main problem, which is that of securing co-operation, as compulsion always fails. The Home Secretary now has power to repeal all the local laws and to authorise the magistrates' court to commit to a therapeutic hostel, *i.e.*, in effect to abolish imprisonment for drunks, but this step will not come about for some time, for an estimated 1,000 places will be needed in special new hostels providing continuous support and guidance for alcoholics. There is an alcoholics' hostel called Rathcoole House with a seconded probation officer as warden.

Persistent offenders

The failure of preventive detention and corrective training to deal with the problem of the relatively petty but persistent offender has long been recognised and the formal abolition of these sentences will not be regretted. Preventive detention was originally envisaged as a virtually indeterminate sentence for the big-time criminal, but it became a measure for dealing with the persistent, pathetic, small-time criminal. In recent years, the Court of Appeal has largely reviled from this policy. However, unfortunately no new or constructive legislative alternative has been produced, merely the old despairing principles of the longer term of detention for the negative purpose of the protection of the public, namely, the " extended sentence." A sentence may be increased up to five years if the maximum for the offence is less than five years, or up to ten years if the maximum for the offence is between five and ten years. An offender becomes eligible for the extended sentence if since the age of twenty-one he has three serious convictions (punishable by two years or more), one of which attracted a sentence of at least three years or two of which attracted a sentence of two years, he has served an aggregate of at least five years in prison, and the latest offence has been committed within three years of his last final release (including release on licence) from prison. These conditions represent some advance on the old system, for there is no minimum period for the extended sentence, unless the courts create one, as they did for preventive detention. The new scheme does not apply where the offender has kept out of trouble for some time; although it is well recognised that an offender may suffer an occasional lapse at an early stage in rehabilitation, soon after release, and this ought not automatically to be taken as evidence of a lack of promise of rehabilitation. Furthermore, quite a number

of persistent petty offenders do not achieve a really heavy sentence such as three years. It may be that the extended sentence will be applied to the big-time criminal, for the younger man in his twenties, for whom it appears to be intended, is now eligible; or at least for the persistent trivial offender it may prove to be a dead-letter, as preventive detention became by judicial decision, in view of the contemporary practice of the Court of Appeal either to chance probation or to substitute a medium prison sentence, some four or five years, which although heavy is not markedly disproportionate to the gravity of the offence.[26] The type of offender for whom the extended sentence is intended is not made clear, and it seems that the old ambivalent policy may continue. The Government certainly intended that the extended sentence should be used for the big-time criminal and not the persistent, petty offender. The institutional policy for the socially inadequate, persistent, trivial offender has failed, at considerable public expense, and it may be that society will have to reconcile itself to leaving these people at large and losing a few bottles of milk, bicycles and raincoats. Some form of supportive non-custodial treatment, such as special hostels, will have to be tried.

Release on licence

The release on licence or parole system, as distinguished from mere remission, is introduced for the first time into English penal practice. The basic controversies in principle that had to be resolved were whether the system should be judicial or executive and whether mandatory or discretionary, or any combination. In the result a compromise has been reached (in place of the original proposal for a purely discretionary executive scheme).

Local Review Committees (L.R.C.),[27] of which there will be one in every prison, *i.e.*, about sixty, comprising a prison governor, a senior probation officer who is not a prison welfare officer, a member of the board of visitors or visiting committee, and an independent person, will act as a kind of filter. Every prisoner before becoming technically eligible has a statutory right to interview and will be interviewed informally by one of the members, probably the senior probation officer, *i.e.*, not a prison service member, the report of the interview will be considered by the L.R.C., and a report by the L.R.C. (or all of its members individually in the event of a difference of opinion) will be sent to the Prison Department. The strain on the prisoner of a full committee appearance is to be avoided, as a result of the experience of the preventive detention boards. It may be anticipated that most of the successful candidates will come from the open prisons, for presence in an

[26] David Thomas, "The Criminal Justice Bill: New Issues in Sentencing Policy" [1967] Crim.L.R. 277 at pp. 278–285.

[27] Local Review Committee Rules 1967 (S.I. 1967 No. 1462). Parole Board Rules 1967 (S.I. 1967 No. 1685).

open prison is itself evidence of progress. The case of each eligible prisoner will be reviewed at yearly intervals. On the basis of the report the Home Secretary will then select cases for reference to the Parole Board, though he is not bound by the opinion of the L.R.C. one way or the other. The Parole Board will consist of a chairman (Lord Hunt) and sixteen others including persons who hold or have held judicial office, psychiatrists, experienced after-care specialists and criminologists. The Parole Board, an independent but not initiating body, with an administrative and not a judicial function, will work closely with the prison service, because isolation on the part of the Parole Board might otherwise have a bad effect upon the morale of the prison officers, reducing them to mere gaolers, whereas it is vitally important to involve the prison service in the taking of important decisions in the progress of the prisoner. In order to avoid an emotional build-up in the mind of the prisoner there will be no hearing, although in doubtful or marginal cases a single member of the Parole Board may hold an informal interview. Any written representations made by the prisoner must be considered by the L.R.C., the Prison Department and the Parole Board. The Lord Chief Justice and the trial judge, if available, will be consulted. Further reports and information called for by the Parole Board will be made available, through the instrumentality of the Home Office, but independent outside reports may be obtained this way, *e.g.*, a fresh medical report. A prisoner must have served one-third or one year of his sentence, whichever is the longer, before becoming eligible for release, and out of the estimated 4,500 annually eligible only some 750–1,000 will come before the Parole Board. The numbers will be nearly doubled for the first working year because of the back-log created by the 4,500 eligible on the day the scheme comes into operation. The Board will probably sit five days a month, members holding a part-time appointment. If the Board recommends no release, the Home Secretary must accept the decision; if the Board recommends a release, the Home Secretary may not follow it. In practice he normally will act on such a recommendation, but there may be circumstances, *e.g.*, difficulty in finding suitable lodgings, or political implications, which would justify postponing or even totally rejecting the recommendation. Political accountability for the exercise of such a power is not a satisfactory safeguard, and it might have been better to have conferred power on the Board to impose appropriate conditions, *e.g.*, release when and only when specified lodgings became available, rather than simply to make recommendations for conditions. Licence will continue to run until the parolee would normally have been released, *i.e.*, after two-thirds of the original sentence. The burden of supervision will fall upon the probation service.

Upon considering evidence of unsatisfactory conduct the Board may revoke the licence, and in cases of urgency the Home Secretary may do so without waiting for a Board recommendation, but

he must then refer the case to the Board. Similarly licence may be revoked by quarter sessions or assizes if the parolee appears before them. Recall by administrative action poses difficult problems for the probation officer, and recall only by court order, after judicial inquiry, in all cases might have been more acceptable in principle by analogy with the breach-of-probation procedure. However, the supervising officer must bear the responsibility of making an adverse report. The prisoner is entitled to be told the reasons for the recall and to make written representations, and he may be interviewed by a member of the L.R.C. or even of the Board. If the Board recommend immediate re-release the Home Secretary must give effect to it; he has no overriding discretion, presumably as a measure of protection for the prisoner against executive power. A parolee whose licence is revoked by the court may not be released again on licence until one year or one-third of the unexpired term of the licence period, whichever is the longer, has passed.

The new system is to apply to "lifers," although there is no minimum period of sentence to be served before eligibility. In some cases, *e.g.*, mercy killing, a year may be too long; in others, *e.g.*, shocking murder, one year would be much too short and might induce false hopes. The Lord Chief Justice and the trial judge, if available, must be consulted before the case goes to the Board and release may only be ordered on the recommendation of the Board. Preparatory work will be carried out by probation officers seconded as prison welfare officers, whose numbers will be doubled, and normally there will be supervision on licence, normally carried out by probation officers. Rehabilitation is a continuing process. The policy of decentralising after-care and strengthening community involvement continues, and regional consultative committees are being set up, consisting of representatives from probation committees, the probation service, the prison service, and NACRO, with Home Office observers. More adult probation hostels will be provided; without them the release-on-licence scheme will have practically no chance of success. An annual extra case-load of 1,000 persons to supervise represents work for the equivalent of an extra twenty full-time probation officers on a fifty-case-load basis.

The parole system represents a welcome advance in so far as it recognises that the most appropriate length of sentence cannot finally be determined at the trial but must be modified and revised in the light of the progress of the prisoner. Leaving it to the Home Office, admittedly guided by the L.R.C., to put up candidates to the Parole Board may cause difficulty. It might have been better to have excluded the prison governor and his colleagues from the L.R.C. The probation service is anxious about the possibility of recommendations for release being made without full and up-to-date information on a prisoner's home circumstances being available. The Parole Board has been given a goodly measure of independence, whilst avoiding isolation, but may be too dependent

upon the Home Office for information. The right to make representations in writing only may handicap the ill-educated prisoner who lacks advice and assistance. The power of the Home Secretary to decline to follow a recommendation of the Board, and so possibly reduce it to a merely prestigious advisory body, seems to be of dubious validity. Either the Board should be advisory or it should take decisions. There need be no anxiety that the courts will increase sentences to take account of the possibility of early release on licence.[18]

The critical matter will be the criteria applied by the Board in reaching decisions, and in this connection the importance of research and application of research cannot be exaggerated. The danger of favouring the "good prisoner" is well recognised, and the principal factor will be the likelihood of successful re-establishment in the community, in the light of conduct since conviction, subject to the requirement of not exposing the public to unnecessary danger or risk. The Minister expressed the broad principles as follows [19]:

> "The object of the scheme . . . is . . . to release those prisoners who are likely to respond to generous treatment and are not regarded as a risk to the public . . . [T]he intention is that a prisoner should be released on licence after consideration of his criminal and social history before his current sentence, including the length of periods of liberty, any conduct under supervision or response to after-care, work record, and domestic background; his response to treatment and training in prison during his current sentence; the circumstances of his current offence, including in particular any observations by the sentencing judge or the Court of Appeal, and information about his domestic and employment situation on release. Consideration will also be given to whether he has co-operated in the training provided and made satisfactory response; has reached a point in his sentence in which further training is unlikely to improve his prospects of leading a good and useful life on release [a 'peak']; whether there appears to be no significant risk of his committing a further serious offence, and that arrangements are available, or can be made, for accommodation and occupation outside prison; and whether there are no overriding objections in the circumstances of the offence itself, having regard to such considerations and observations made by the courts at the time."

In fact only a very small percentage of the prison population represents any substantial risk to the public. Too much must not be expected from release on licence. Indeed, it would be a mistake to concentrate too many resources upon the scheme, especially

[18] *R.* v. *Blake* [1962] 2 Q.B. 370 at p. 381; *R.* v. *Jones* [1961] 2 All E.R. 668 at pp. 675D–676A; [1962] 2 W.L.R. 575 at pp. 585–586; *R.* v. *Maguire* (1956) 40 Cr.App.R. 92.

[19] Lord Stonham, House of Lords, Vol. 283, cols. 746–747, June 12, 1967.

probation manpower, when concentration upon young people, particularly in probation hostels, would yield a more promising long-term result. It is a matter for satisfaction that continuing research will be built into the work of the Parole Board; the criminologist would appear to be the member particularly well qualified to supervise this work. The Parole Board represents a potentially significant development in penal practice. The indeterminate sentence for the adult is coming in. Executive decision is replacing judicial decision. The Board could be the nucleus of a sentencing tribunal. The rehabilitation of the prisoner begins on his reception into prison and he is subject to continuing review, not just forgotten until release. Outsiders, especially probation officers, but many other experts too, participate in release decisions. The prison officer has the opportunity of involvement by developing a constructive relationship with the prisoner, promoting early release and bringing pleasure to the prisoner and satisfaction to himself.

Conclusion

The Government hoped that the process of justice would be simplified and strengthened, whilst safeguarding the rights of the accused, and that the changes in sentencing policy, especially the new flexibility in fines and imprisonment, and the new parole procedure would deflect many criminals from recidivism and would deflect many minor offenders back to the paths of decent citizenship. One may only hope that this hope is fulfilled by experience. No advance in fundamental penal philosophy, which the Royal Commission might have been able to produce, is to be found in the Act. The criminal trial is to be expedited and the potential increase in the prison population is to be held in check for essentially administrative reasons created by the crime wave. Improved efficiency is certainly welcome, but not at the expense of the accused or the prisoner. Much will depend on the quality and strength of the probation service and the translation of fundamental research into viable policies.

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THE GRANTING OF BAIL: PRINCIPLES AND PRACTICE*

THERE is a growing awareness among those concerned with the administration of justice about the working of the bail system; not only are the legal criteria and principles upon which bail should be granted being questioned and examined, but also there is evidence of a practical concern for the effects which a remand in custody may have upon the person to whom bail is not granted. In the United States, the pioneering work done by the Vera Foundation in the Manhattan Bail Project led to the National Conference on Bail and Criminal Justice, held in Washington, D.C., during May 1964, which encouraged many of the delegates to start similar bail projects in their own home states.[1] In England, also, first steps in the same direction have been taken by "Justice," the British Section of the International Commission of Jurists, which arranged a one-day conference on "Bail and Remands in Custody" on November 27, 1965.[2] As a result of this conference, "Justice" has recently set up a working party to consider various aspects of this problem.[3]

STATISTICAL BACKGROUND

The annually published criminal statistics of England and Wales [4] and statistical tables published by the Prison Department of the Home Office [5] give some idea of the size of the problem, although they do not shed much light upon the nature of the factors involved. The *Criminal Statistics* give details only of those persons detained in custody after committal for trial, and they do not provide any equivalent figures for those persons who are finally dealt with by the magistrates. In 1964, 22,558 indictable offenders were committed for trial and 8,774 of them (*i.e.*, almost 39 per cent.) were remanded in custody.[6] An examination of the statistics of the last fifty years shows that the proportion remanded in custody before trial has almost halved in that time, although the number of persons committed for trial has been steadily increasing (Table 1).

* Note: Unfortunately, this paper was written too early for consideration of the Criminal Justice Act 1967, of which ss. 18–28 refer to new restrictions on the refusal of bail.

[1] *National Conference on Bail and Criminal Justice: Proceedings and Interim Report* (Washington, D.C., 1965).

[2] Reported in the *New Law Journal*, December 9, 1965, p. 195.

[3] *New Law Journal*, June 16, 1966, p. 954. This working party published an Interim Report in December 1966.

[4] *Criminal Statistics: England and Wales, 1966* (Cmnd. 3332).

[5] *Report on the Work of the Prison Department, 1965. Statistical Tables* (Cmnd. 3304).

[6] *Criminal Statistics: England and Wales, 1964*, Table 1 (a).

TABLE 1*

PERCENTAGE OF PERSONS REMANDED IN CUSTODY AFTER COMMITTAL FOR TRIAL, BY OFFENCE GROUP: 1915–64

Offence Classification	1915 %	1925 %	1935 %	1946 %	1955 %	1964 %	no.
Class I: (Offences against the person)	61·6	42·8	38·8	27·0	27·9	27·3	(1,429)
Class II: (Offences against property with viol.)	87·1	76·1	64·9	45·8	55·3	53·0	(5,955)
Class III: (Offences against property w/o viol.)	67·9	51·7	46·8	32·3	23·6	22·0	(1,115)
Class IV: (Malicious injuries to property)	84·8	64·3	60·2	44·4	55·0	49·3	(162)
Class V: (Forgery offences against currency)	76·7	54·4	51·3	41·3	14·7	21·9	(76)
Class VI: (Other offences)	51·5	18·3	9·6	6·4	13·1	27·9	(34)
TOTAL: %	68·6	56·0	51·2	39·1	42·3	38·8	
No.	3,971	4,559	4,265	7,212	7,318	8,774	

*Source: *Criminal Statistics*, Table I: Police Returns—Indictable Offenders. (Table 1 (a) in 1964).

From Table 1 it is clear that each offence category shared generally in this decrease in the proportion remanded in custody, and there is a pattern of remarkable consistency in the rank order of each offence group: Class II (Offences against property with violence) always has the highest proportion remanded in custody, closely followed by Class IV (Malicious injuries to property), which is numerically a very much smaller group of offenders. These six offence groups are, of course, rather crude classifications and in certain instances conceal a great internal variation. This variation is particularly evident in Class I (Offences against the person), which is always quite low in the rank order: it ranges from "murder of persons aged one year and over," in which usually over 99 per cent. of the persons are remanded in custody, to "Causing death by dangerous driving," in which the proportion in custody is usually between 1 and 2 per cent. Nevertheless, a detailed analysis of the last five years has shown a similar consistency in the proportion of

offenders detained in custody in each of the separate indictable offences in the Home Office statistical classification (Table 2).

TABLE 2 †

PERCENTAGE OF OFFENDERS REMANDED IN CUSTODY AFTER COMMITTAL FOR TRIAL, BY OFFENCE: 1960–64

Offence	1960 %	1961 %	1962 %	1963 %	1964 %	no.
Murder (1·1)‡	99·3	99·3	99·3	96·5	99·5	(154)
Robbery (34)	67·0	63·4	67·3	68·6	65·9	(842)
Burglary (28)	58·3	61·6	58·6	52·1	52·6	(781)
Housebreaking (29)	56·5	55·4	55·3	54·2	52·4	(2,551)
Shopbreaking (30)	42·2	41·9	43·9	50·3	49·9	(1,192)
Rape (19)	34·6	47·1	46·4	41·7	42·1	(101)
Causing death by dangerous driving (40)	0·5	1·4	2·4	1·0	1·2	(6)
TOTAL: %	38·6	39·1	40·4	39·6	38·8	
No.	11,641	12,679	11,414	8,854	8,774	

†Source: *Criminal Statistics*, Table 1, 1960–63, Table 1 (a) 1964.
‡Figures in brackets refer to the Home Office classification of offences.

These legal classifications are to some extent "artificial," and it is only possible to draw reliable conclusions about the effect which the actual nature of the offence has upon the bail decision when the individual cases are studied in detail, or when the statistics are based upon a more realistic classification, which takes into account the varied circumstances surrounding the commission of each offence.[7]

In addition to the persons detained in custody before trial at a higher court, there is a much larger number who are remanded in custody and finally dealt with by the magistrates. The only regularly published figures which give an approximate estimate of the numbers involved are those published by the Prison Department of the Home Office, detailing the annual prison receptions. In 1963, for example, 85,506 untried persons were received on remand, of whom only about a quarter were awaiting trial at a higher court.[8] During the last ten years for which these figures are available, the number of untried remand prisoners has risen by over 56 per cent., from 22,711 in 1953, although they have always constituted the same proportion, about a third, of the annual total

[7] For examples of attempts to formulate classifications of this kind, see F. H. McClintock and H. Gibson, *Robbery in London* (London, 1961), Chap. 2, and F. H. McClintock *et al.*, *Crimes of Violence* (London, 1963), Chap. 2. Similar "situational" classifications will be included as part of a piece of empirical research work on the bail system currently being carried out by the present author.

[8] *Prisons and Borstals, 1963*: *Statistical Tables*, Table C. 1.

of prison receptions.[9] This trend towards an increase in the number of persons remanded to prison, and no decrease in the proportion of prison receptions who are on remand, is occurring at a time when the use of imprisonment as a sentence is being discouraged, especially for offenders under the age of twenty-one.[10] In fact, over half of these remand prisoners in 1968 were not given a custodial sentence after conviction, which raises the question whether the factors taken into consideration when the magistrates decide that the pretrial remand should be in custody are different from those considered when the same or a similar Bench finally gives the offender some form of non-custodial sentence. In many instances the factors determining the two decisions are, and should be, completely different, but magistrates often justify a remand in custody on grounds only really valid in terms of a sentencing decision, and then subsequently impose a non-custodial sentence which seems to undermine further the justification for their first decision.[11]

Very little research has been done in this country upon the questions posed by such statistics as these, with the notable exception of the Home Office Research Unit's study in 1960.[12] The working of the bail system in the United States is, in many respects, considerably different from the system as operated in this country. One of the main problems which stimulated the Vera Foundation to undertake its work was the plight of the "indigent defendant," who is penalised by the American manipulation of the financial aspect of the bail system. It is very rare for English magistrates to set high bail, and the Home Office Research Unit found that only a very small number of persons were remanded in custody solely because of an inability to find requisite sureties.[13] An instructive emphasis in the American research is upon the effect which a remand in custody has upon a person's ability to prepare his defence adequately. It is very difficult to measure the effect accurately without a controlled experiment, and merely to quote figures showing that those on bail are more frequently acquitted than those remanded in custody proves very little.[14] Similar figures, for England and Wales, were once published in the *Criminal Statistics* from 1898 until 1918. These figures showed that 45–50 per cent. of those acquitted at assizes and quarter sessions had been released

[9] Because of their relatively short stay they only form 5 per cent. of the daily average prison population.

[10] Recent figures showing the decrease in the proportion of indictable offenders who are sentenced to imprisonment are as follows: aged 17 to 21 years: 7·0 per cent. (1,994) in 1960—3·5 per cent. (1,391) in 1964; aged 21 and over: 26·2 per cent. (20,480) in 1960—21·6 per cent. (22,164) in 1964.

[11] It is also noteworthy that 1,688 out of 7,492 committed for sentence to quarter sessions were not given a custodial sentence in 1964.

[12] Home Office Research Unit Report, *Time Spent Awaiting Trial* (London, 1960).

[13] *Op. cit.* p. 34, Table 36.

[14] C. E. Ares, A. Rankin & H. Sturz, "The Manhattan Bail Project: An Interim Report on the Use of Pre-trial Release" (1963) 38 N.Y. Univ. Law Rev. 87.

on bail before trial, whereas only 18–14 per cent. of those convicted at these courts had been so released.[15] It seems a sensible assumption that a man on bail has a better chance to prepare his case before trial than has a man who is remanded in custody, but unless we take into account such factors as the acquittal rate for different offences, and unless we know how much emphasis the magistrates place upon the weight of evidence when they are deciding about bail, we cannot draw any valid conclusions from these bare statistical observations.

The research projects in the United States emphasise the importance of basing a decision about bail upon a detailed assessment of the defendant's " community roots," in the belief that it is these factors which determine whether a man is likely to appear to take his trial. The reason for this almost exclusive preoccupation with a defendant's " community roots " is that American courts have consistently laid down that the sole consideration in setting pre-trial bail is to ensure appearance at trial. For example, in the famous case of *Stack* v. *Boyle*, it was stated:

> " The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty. . . . Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant." [16]

The main purpose of the present paper is to examine the historical development of the statutes regulating the granting of bail in England, and the judicial pronouncements in reported cases, in an attempt to discover the extent to which English principles are as clearly defined as they seem to be in the United States of America. According to English law, the granting of bail to untried persons is a matter entirely for the discretion of the magistrates, with the single exception of cases of treason. It would seem to be of vital importance that magistrates should have some clear guiding principles to which to refer in the exercise of this discretion, so as to ensure that their decisions are in accordance both with the interests of justice and with the liberty of the individual subject.

Statute of Westminster

The first statutory regulation of the granting of bail in England was by the Statute of Westminster 1275.[17] The need for some regulation had been created by the irresponsible use which had been made by the sheriffs of their wide but ill-defined powers to grant or refuse bail. The Statute of Westminster lists thirteen types

[15] *Criminal Statistics*, Table XXXIX, 1893–1913. These data first appeared in *Criminal Statistics, 1895*, Supplementary Tables I–II. Table XXXIX was discontinued at the outbreak of the First World War, and never reappeared.

[16] 342 U.S. at pp. 4, 5 (1951).

[17] 3 Edw. 1, c. 15.

of cases in which persons are not to be bailed; these can be grouped into (i) serious offences, *e.g.*, homicide, arson, counterfeiting coin of the realm or the King's Seal, treason; (ii) offences in which the guilt of the accused is certain, or every probable, *e.g.*, "*furtum manifestum*," thieves "openly defamed and known," persons who have confessed; and (iii) offenders who are "outlaws" of justice, *e.g.*, prison escapees, persons excommunicated or banished, etc. It then continues:

> "but such as be indicted of larceny by inquests taken before sheriffs or bailiffs by their office, or of light suspicion, or for petty larceny . . . if they were not guilty of some other larceny aforetime, or guilty of receipt of felons, or of commandment, or of force, or of aid in felony done; or guilty of some other trespass . . . shall from henceforth be let out by sufficient surety, whereof the sheriff shall be answerable, and that without giving ought of their goods."

The statute lays down severe penalties for sheriffs who do not abide strictly by these regulations.

It is interesting to note that this first statute regulating English bail procedure did not attempt to set up a single principle upon which all decisions about bail should be based. Instead, it lists a series of specific situations and offences in which bail should not be granted, and a shorter list of offences in which bail should not be refused. These two lists can be seen to be based on the three factors already mentioned, namely, the seriousness of the offence, the likelihood of the accused's guilt, and the "outlawed" status of the accused. Undoubtedly, these three factors could, in turn, be said to be ultimately derived from the single criterion of the likelihood of the accused's appearance for his trial, but in the centuries that follow this statute the emphasis in legal decisions continually changes from one factor to another, while the statutory basis remains unchanged.

The Statute of Westminster fixed what offences were bailable, or not, for the next five-and-a-half centuries. None of the statutes, intervening between 1275 and 1826, made any fundamental changes in the principles upon which bail should be granted or withheld; what they did, in the main, was to make changes in the procedure whereby bail was granted, in attempts to safeguard it from administrative abuse. Thus, in 1487 a statute [18] enacted that bail should henceforth be granted only by two justices, instead of one as was previously customary, because "many persons not bailable were often bailed, whereby many murderers and felons had escaped." The new system still apparently left room for much abuse, for in 1554 [19] it was stated that one justice had often released on bail serious offenders in his own name and in the name of another justice who knew nothing of the case. This new statute reiterated that

[18] 8 Hen. 7, c. 8 (1487).
[19] 1 & 2 Phil. & M. c. 13 (1554).

justices were not allowed to bail anyone not bailable by the Statute of Westminster, and that they must be bailed in open sessions by at least two justices.

Nineteenth-century statutes

The statutes enacted in the reign of Philip and Mary were largely repealed by the statute of 1826,[20] which was itself amended nine years later.[21] In the first section of the former statute great emphasis is placed on the principle that bail should be granted in cases where the presumption of guilt is small, and, conversely, should be rarely granted in cases where there is a strong likelihood of conviction: "Where any person shall be taken on a charge of felony, or suspicion of felony, . . . and the charge shall be supported by positive and credible evidence of the fact, or by such evidence . . . as shall raise a strong presumption of the guilt of the person charged, such person shall be committed to prison." The later statute of 1835, however, authorises the bailing for any offence, whether there is or is not a strong presumption of guilt:

> "Whereas in many cases the taking bail for the appearance of persons charged with felony may be safely admitted without endangering the appearance of such persons to take their trial in due course of law, and it is therefore expedient in such cases to amend and extend the provisions in that respect of an Act passed in the seventh year of King George the Fourth. . . . It is therefore enacted that it shall be lawful for any two justices of the peace . . . to admit any person or persons charged with felony, or against whom any warrant of commitment for felony is signed, to bail . . . *notwithstanding such person or persons shall have confessed the matter laid to his or their charge, or notwithstanding such justices shall not think that such charge is groundless, or shall think that the circumstances are such as to raise a presumption of guilt.*" (Italics added.)

This statute is of real significance, because, for the first time in the statutes governing bail procedure, all the other factors which were previously held to be of crucial importance in deciding whether or not to grant bail (*e.g.*, presumption of guilt, confession, etc.) are subordinated to the single criterion of the risk that the accused will not appear to take his trial.[22]

The origin of the present-day magisterial discretion in the granting of bail lies in the Indictable Offences Act 1848.[23] This Act provides that the committing justice may in his discretion admit to bail a person charged with any felony, or with any of a dozen misdemeanours listed. Stephen[24] comments: "The short result

[20] 7 Geo. 4, c. 64 (1826).
[21] By 5 & 6 Will. 4, c. 33, s. 3 (1835).
[22] 1 Chitty's *Burn's Justice* (28th ed., London, 1837), p. 817.
[23] 11 & 12 Vict. c. 47, s. 23 (1848).
[24] Sir James Fitzjames Stephen, *A History of the Criminal Law of England* (London, 1883), Vol. 1, p. 289.

is that the justice may in his discretion either bail or refuse to bail any person accused either of felony or of any common misdemeanour except libel, conspiracies other than those named, unlawful assembly, night poaching, and seditious offences." In these latter cases bail cannot be refused; and in cases of treason no bail may be taken except by order of a Secretary of State or by the High Court. The cardinal principle in the light of which this discretion should be exercised is again specified: "Such justice of the peace may, in his discretion, admit such person to bail upon his procuring and producing such surety or sureties as, in the opinion of such justice, will be sufficient to ensure the appearance of such accused person at the time and place when and where he is to be tried for such offence." The Bail Act 1898 [25] modified this absolute requirement of sureties, but otherwise left the discretion of the justices unaltered. The position was well summed up in the words of the Earl of Halsbury, when he was presenting his Bill to the House of Lords, for its second reading:

> "The Bill which I present . . . leaves everything to the discretion of the justices. It can in future never be suggested that the justices have not the power, if they think proper, to admit to bail any accused person, even on his own recognisances. There can be no doubt that there has been an undue and unreasonable reluctance to admit to bail. I propose to get rid of the excuse by giving the magistrates unfettered discretion, except in certain cases, such as treason, to admit to bail any persons whom they have reason to believe will submit to take their trial." [26]

From this brief survey of the statutes, it can be seen that although there was no single principle governing the granting of bail for a long period between the Statute of Westminster 1275 and the early nineteenth century, yet since the statute of 1835 [27] it has been laid down that the guiding principle should be the appearance of the accused person to take his trial at the appointed time. Thus, as far as the statutes are concerned, it seems that there is general agreement between the English and the American principles. We must now examine the evidence in reported cases to see how well judicial observations and decided cases accord with the statutory principles established in the nineteenth century.

Judicial attitudes

Perhaps the most surprising fact which emerges, when searching for judicial statements and reported cases involving bail, is the paucity of the existing material. There are no more than about two dozen reported cases in which guidance has been given upon the principles which should determine the granting of bail by

[25] 61 & 62 Vict. c. 7 (1898).
[26] (1898) H. L. Deb., Vol. 53, col. 1494.
[27] 5 & 6 Will. 4, c. 33, s. 3 (1835).

magistrates. There are, of course, considerably more cases concerned with procedural aspects of bail.

(a) *Non-appearance at trial.* First, there are several cases in which the statutory principle seems most clearly to have been followed and enunciated.

In *R.* v. *Scaife*,[28] it was contended, for the Crown, that the depositions showed clearly that the offenders were guilty of the offence (being in possession of a silver coin mould), and therefore the court ought not to allow them to be bailed; to this contention, Coleridge J., giving judgment, replied:

> "I conceive that the principle on which persons are committed to prison by magistrates, previous to trial, is for the purpose of ensuring the certainty of their appearing to take trial. It seems to me that the same principle is to be acted on in an application for bailing a person committed to take his trial, and it is not a question as to the guilt or innocence of the prisoner. It is on that count alone that it becomes important to see whether the offence is serious, whether the evidence is strong, and whether the punishment for the offence is heavy. It is to be observed that the late statute 5 & 6 Will. 4, c. 33, s. 8, extending the provisions of the former statute 7 Geo. 4, c. 64, authorises magistrates to admit to bail persons charged with felony, even in cases where they have confessed their guilt."

Similar arguments were put forward in *R.* v. *Robinson*[29]; on Robinson's behalf it was claimed that it was necessary for his proper defence that he should be at liberty to prepare his case; he swore in the affidavit that he had no intention of absconding, and he had several references from respectable persons. Again Coleridge J. gave judgment:

> "When you want to know whether a party is likely to take his trial, you cannot go into the question of his character or his behaviour at a particular time; but you must be governed by the answers to three general questions. First, what is the nature of the crime, is it grave or trifling? . . . The next question is, what is the probability of a conviction? . . . It does seem strange that the prisoner does not suggest any of the probable defences which have been mentioned by his counsel, and does not venture to deny his guilt. The only question which remains is, what is the probable punishment in the event of a conviction? Trying the case by these tests, I am clearly of opinion that I ought not to interfere to bail the applicant."

Finally, in quashing the conviction in *R.* v. *Rose*,[30] Lord Russell C.J. said: "I observe that in this case bail was refused for the prisoner. It cannot be too strongly impressed on the magistracy of the country that bail is not to be withheld as a punishment, but

[28] (1841) 10 L.J.M.C. 144; 5 J.P. 406.
[29] (1854) 23 L.J.Q.B. 286; 18 J.P. 744.
[30] (1898) 18 Cox C.C. 717; 67 L.J.Q.B. 989.

that the requirements as to bail are merely to secure the attendance of the prisoner at trial."

The Bail Act 1898 [31] authorised magistrates in their own discretion to grant bail to an accused person on his own recognisances only, without the need for sureties. One theme which seems to recur in the debates and discussions which surrounded the passing of this Act was that poor people were less likely to abscond successfully than were the more wealthy. When he presented his Bill for its second reading by the House of Lords, the Lord Chancellor, the Earl of Halsbury, said:

> "For some reason which I am unable to understand, the magistrates throughout the country have exhibited very strong reluctance to admit to bail. I am told by those who ought to know that it has arisen from a belief that the facilities for railway travelling, etc., aid the escape from justice of persons, if allowed out on bail, but I believe that our improved system of police and the electric telegraph make it almost impossible for poor people to escape." [32]

This theme was developed by Lord Russell of Killowen C.J. when he charged the grand jury at Salisbury Assizes, 1899 [33]:

> ". . . it was the duty of magistrates to admit accused persons to bail, wherever practicable, unless there were strong grounds for supposing that such persons would not appear to take their trial. It was not the poorer classes who did not appear, for their circumstances were such as to tie them to the place where they carried on their work. They had not the golden wings with which to fly from justice."

A similar sentiment was expressed in a letter sent to magistrates on behalf of the Home Secretary, Herbert Gladstone, on August 6, 1906:

> "Where a person who is charged with a minor offence appears to have little or no means, and is not believed to belong to the criminal, vagrant, or homeless classes, the justices should generally grant the accused his release pending trial, either on his own recognisances or on bail in such small amount as he may reasonably be expected to find. Such persons as are here contemplated are not of the class who would readily desire to evade justice by leaving their homes and escaping elsewhere; their lack of means would make it very difficult for them, even if they wanted to do so." [34]

(b) *Seriousness of the offence: bail in homicide cases.* It is clear, particularly from the judgments delivered by Coleridge J.,[35] that several factors can properly be taken into account when assessing the likelihood that an accused will appear to take his trial. One

[31] 61 & 62 Vict. c. 7 (1898).
[32] (1898) H. L. Deb., Vol. 53, cols. 1493–1494.
[33] (1899) 63 J.P. 193.
[34] (1906) 70 J.P. 376.
[35] *e.g.*, in *R.* v. *Robinson* and *R.* v. *Scaife*, above.

of the most common of these " secondary " factors is the seriousness of the offence.

In the middle of the last century there was a series of cases [36] in which the arguments revolved around the admissibility or rather the advisability of granting bail in cases of murder. It is in such cases of murder that the relationship between the granting of bail and the criterion of the " seriousness of the offence " is most sharply brought into focus. The decision of Wightman J. in *R. v. Andrews* [37] made it clear that once a true bill had been returned by the grand jury for a capital offence the court should under no circumstances admit the accused to bail; and this was a case in which the evidence against the accused was not strong, as Andrews had been charged with murdering his four-year-old daughter by setting fire to her bed, in circumstances which made it almost certain that he would be acquitted at his trial. A legal editor at the time expressed doubt about the principle which had thus been laid down for murder cases:

> " It is now therefore abundantly clear that, in cases of murder, the judges will under no circumstances admit to bail after a bill found by the grand jury. If, indeed, from the station and connections of the accused, or the facts of the case, there is no real ground for an apprehension that he will avoid his trial, this inflexible rule is certainly not one which necessity warrants." [38]

The complex nature of the interrelationship of factors in murder cases was clearly shown in the case of the Frenchmen accused of aiding and abetting wilful murder, *Ex p. Barronet and Allain.*[39] In this case, Erle J., giving the decision of the court, said:

> " Thus then it appears that the crime charged is of the highest magnitude, the punishment of it assigned by law of the extreme severity, and the evidence of guilt a confession; under such circumstances, the court is bound to presume that no amount of bail would secure the presence of the accused at the trial should they be liberated."

Lord Campbell C.J. concurred; and Coleridge J. set down the order of priorities as follows:

> " I do not think that an accused party is detained in custody because of his guilt, but because there are sufficient probable grounds for the charge against him as to make it proper that he should be tried, and because the detention is necessary to ensure his appearance at trial. . . . It is a very important element in considering whether the party, if admitted to bail, would appear to take his trial; and I think that in coming to

[36] *R. v. Chapman* (1888) 8 C. & P. 558; *R. v. Gutteridge* (1840) 9 C. & P. 228; *R. v. Andrews* (1844) 2 D. & L. 10; *Ex p. Barronet and Allain* (1852) 1 E. & B. 1; *R. v. Scaife* (1841) 10 L.J.M.C. 144.
[37] (1844) 2 D. & L. 10.
[38] (1844) 8 J.P. 887.
[39] (1852) 1 E. & B. 1.

> a determination on that point three elements will generally be found the most important: the charge, the nature of the evidence by which it is supported, and the punishment to which the party would be liable if convicted. In the present case, the charge is that of wilful murder; the evidence contains an admission by the prisoners of the truth of the charge, and the punishment of the offence is, by law, death."

In practice, when lay magistrates refuse bail because of the serious nature of the charge it is unlikely that they would always justify their decision in terms similar to these, on the grounds that a man facing a serious charge is more likely to have an incentive to abscond. It is questionable, however, whether there is a strict necessity for such justification, or whether the seriousness of an offence should stand as an absolute principle in its own right.

(c) *Criminal record and further offences.* By far the most common factor cited in the more recent reported cases, as justification for magistrates to refuse bail, is the combined factor of a man's previous criminal record and the consequent likelihood that he will commit further offences if released on bail. Many of these judicial pronouncements were occasioned by cases of men who had been released on bail and who had committed further offences while so released.[40]

In *R.* v. *Phillips*,[41] the Court of Criminal Appeal said, through Atkinson J.:

> " Some crimes are not at all likely to be repeated pending trial and in those cases there may be no objection to bail; but some are, and housebreaking particularly is a crime which will very probably be repeated if a prisoner is released on bail, especially in the case of a man who has a record of housebreaking such as the applicant has. . . . They [*i.e.*, the court] wish the magistrates who release young housebreakers on bail such as this applicant to know that in nineteen cases out of twenty it is a mistake."

In two later cases, also before the Court of Criminal Appeal, the offence which was committed on bail was not a breaking offence, but robbery with violence. In *R.* v. *Wharton*,[42] the applicant had been committed for trial on a charge of robbery with violence to the Manchester Assizes, and had been released on bail; but only two days before he was due to be tried he committed another similar offence of robbery. Lord Goddard C.J. observed: " It is surprising to find that the magistrates admitted him to bail considering his past record, because he had been convicted over and over again. . . . This is what comes of granting bail to these men with long criminal records." This case gave rise to a Home Office Circular

[40] *R.* v. *Phillips* (1947) 32 Cr.App.R. 47; *R.* v. *Pegg* [1955] Crim.L.R. 808; *R.* v. *Wharton* [1955] Crim.L.R. 565; *R.* v. *Windle* (1956) 120 J.P. 362.
[41] (1947) 32 Cr.App.R. 47.
[42] [1955] Crim.L.R. 565.

(No. 182 (1955)) to all magistrates, containing a transcript of Lord Goddard's statement about the granting of bail. Nevertheless, in the following year, in *R.* v. *Gentry*,[43] Lord Goddard had to repeat his warning about the inadvisability of granting bail to men with long criminal records. Gentry not only committed another offence on bail but also absconded to join a ship bound for South America. Although only thirty-one years of age, he had already been to approved school, served two sentences of Borstal training, a sentence of ten months' imprisonment, and a period of four years' corrective training. Luckily his ship never reached its destination; it was forced to return to an English port because of bad weather, and Gentry was arrested. He was subsequently sentenced to eight years' preventive detention.

In three quite recent cases [44] the fact that magistrates refer to a man's previous convictions when reaching their decision about bail came to light when there were appeals against the sentence on the ground that their trials had been prejudiced by this preliminary revelation of their previous criminal records. In *R.* v. *Dyson* [45] the accused's forty previous convictions were read out to the justices, and published in a local newspaper; the appeal against the subsequent sentence of eighteen months' imprisonment was allowed, but the court still maintained the principle: "The justices were entitled, if not actually bound, to be acquainted with evidence of the previous convictions." Similarly in *R.* v. *Armstrong*,[46] it was held that

> "It is clear that it is the duty of the justices to inquire into the antecedents of a man who is applying to them for bail, and if they find he has a bad record—particularly a record which suggests that he is likely to commit similar offences while on bail—that is a matter which they must consider before granting bail."

On the basis of these reported cases in the Court of Criminal Appeal, it would appear that the court has given official recognition to an additional principle upon which bail can be refused, and one which clearly differentiates English practice from that of the United States. In a report [47] prepared for the National Conference on Bail and Criminal Justice, held in Washington during May 1964, it was stated that American judges are not authorised to use pre-trial bail as a device to protect society from possible new crimes by the accused. Justice Jackson, sitting as Circuit Justice, expressly repudiated such a justification for denying bail or setting it high, in *Williamson* v. *United States* [48]:

[43] [1956] Crim.L.R. 120.
[44] *R.* v. *Dyson* (1948) 195 L.T.(o.s.) 287; *R.* v. *Fletcher* (1947) 113 J.P. 365; *R.* v. *Armstrong* [1951] 2 All E.R. 219.
[45] (1948) 195 L.T.(o.s.) 287.
[46] [1951] 2 All E.R. 219.
[47] D. J. Freed and P. M. Wald, *Bail in the United States: 1964* (Washington D.C., 1964), p. 5.
[48] 184 F. 2d 280, 282–283 (2d Cir., 1950).

> "Imprisonment to protect society from predicted but unconsummated offences is so unprecedented in this country and so fraught with danger of excesses and injustice that I am loathe to resort to it, even as a discretionary judicial technique to supplement conviction of such offences as those of which defendants stand convicted."

It seems important that the legal status of this principle should be made much more explicit in English law than it is at present, so that magistrates are left in no doubt as to the validity of exercising their bail discretion on the basis of evidence about the criminal record of a defendant appearing before them.

Conclusions

Most modern textbooks of English criminal law and procedure still maintain as the primary reason for the refusal of bail the likelihood of a person absconding, and subordinate all other factors to that chief consideration. In Archbold,[49] it is stated that:

> "The proper test of whether bail should be granted or refused is whether it is probable that the defendant will appear to take his trial. . . .
>
> "The test should be applied by reference to the following considerations:
>
> (1) The nature of the accusation. . . .
> (2) The nature of the evidence in support of the accusation. . . .
> (3) The severity of the punishment which conviction will entail. . . .
> (4) Whether the sureties are independent, or indemnified by the accused person. . . .

These criteria derive almost exclusively from *R.* v. *Robinson*,[50] and relatively little attention is paid to "the undesirability of bail being granted by magistrates in cases of housebreaking, where there is a likelihood of the offence being repeated."[51]

There is, in the author's submission, not only an unacceptably wide divergence between statutory principle and several observations and decisions in reported cases, but also between any of these enunciated principles and magisterial practice as it obtains today. It is, perhaps, mainly because there are few unambiguous principles to which magistrates can refer for definite guidance in the exercise of their traditional discretion in the granting or refusal of bail that they tend to follow the recommendations of the police, rarely granting bail in cases where there is police objection to this course of action.[52] It cannot be certain that the criteria upon which

[49] Archbold, *Pleading, Evidence and Practice in Criminal Cases* (36th ed., London, 1966), § 208.

[50] (1854) 23 L.J.Q.B. 286.

[51] Archbold, *loc. cit.*

[52] Home Office Research Unit, *Time Spent Awaiting Trial* (London, 1960), Table 38, p. 31. Of the 460 cases where the police objected to bail, only in 40 (8.6 per cent.) was bail granted; and of the 957 cases where it was known that the police did not object to bail, only in 45 (4.7 per cent.) was bail refused.

the police make their recommendations are the same as those which would influence a magistrate making a completely independent decision; both the police and the magistrate are concerned that the accused should not abscond, and both are perhaps aware that a man with a long record is a greater bail "risk," especially in the likelihood that he will commit further offences; the magistrates may be more likely to be guided by the principle of the seriousness of the offence *per se*, whereas the police are more aware of the possibilities for interference with witnesses and the "hampering" of their further inquiries. It is with regard to these last factors, those of interference with prosecution witnesses and the hampering of the further inquiries, that there is the greatest divergence between legal principle and practice. Neither of these considerations is recognised by statute- or case-law as a ground for the refusal of bail, and yet, as every magistrate and police officer knows, they are the sole reasons in a significantly large number of bail decisions. In his Sherrill Lectures at Yale University in 1957, Lord Devlin listed the improper interference with witnesses for the prosecution as the third main factor to be considered in the granting of bail.[53] He recognises that this factor is "one of the most difficult to deal with of those that arise on the question of bail," [54] and may mean only that the police want the defendant out of the way while they complete their inquiries. A magistrate frequently finds himself called upon to decide whether to refuse bail in cases where there has already been proven interference with witnesses, and it would seem to be a necessary duty owed to the lay magistracy and in the best interests of justice that the validity of these considerations should be clarified.

If, and when, the principles for the granting of bail are clarified in this way, it will then be necessary to move forward towards a closer analysis of the actual process whereby magistrates reach their decisions in practice. Not enough is yet known about the kind of information which is made available to the magistrates and which is considered relevant to this decision.[55] Only when this kind of knowledge is obtained will it be possible to judge how far the claims of justice and the liberty of the individual are being reconciled to the needs of the practical administration of the legal system, and the complex processes of crime detection and prevention.

A. K. BOTTOMLEY.*

[53] Patrick Devlin, *The Criminal Prosecution in England* (London, 1960), p. 75. His first two factors were (i) the risk of absconding, and (ii) whether the accused were likely to commit further offences if released on bail.

[54] Devlin, *op. cit.* p. 80.

[55] The present author's own empirical research is an attempt thus to analyse the decision-making process of magistrates in the granting of bail.

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REPORTS

A New Context for Planning [1]

Faced with the prospect of seventeen-and-a-half million extra people in Great Britain by the year 2000 [2] and eighteen million cars by 1975 [3] the Government has produced a White Paper on Town and Country Planning.[4] Most of the suggestions are not controversial, one is controversial; it remains to be seen whether even taken together, they will plan us on to happier terms with the extra cars or the extra people.

First, the lesser proposals. In order to reduce the time lapse between a planning appeal and the decision on it the White Paper suggests that the Minister of Housing and Local Government [5] should be given powers to delegate responsibility for deciding certain appeals to selected inspectors.[6] It is proposed that appeals involving "single houses and residential development on small sites, small groups of shops, caravan sites of less than one acre, and other minor forms of development" [7] should be decided by the inspector. His decision could possibly be given within two to three weeks of the hearing.[8] If inspectors spent less time writing reports to the Minister they could spend more time on hearing and deciding appeals.[9] Since over the past five years the Minister has agreed with his inspectors' recommendations in 97·5 per cent. of cases [10] the suggestion is a sensible one.

At present enforcement proceedings cannot be taken against unauthorised development which has continued for four years.[11] The White Paper says that the Government intend to abolish the "four-year rule." [12] This is going too far. The time limit should be extended to, say, six years as in tort and contract.[13] A prudent purchaser of real property asks in inquiries before contract whether any development as defined in the 1962 Act has been carried out on the property or made since July 1, 1948. If the vendor says there has been none then the purchaser who completes the purchase and against whom an enforcement order is made could sue his vendor within six years of the misrepresentation for damages

[1] Heading to para. 6. White Paper on Town and Country Planning 1967 (Omnd. 3333).
[2] para. 6.
[3] para. 7.
[4] *Supra.*
[5] In England, the Secretary of State in Wales and Scotland.
[6] para. 86. There were just under 12,000 appeals in 1966, more than half of them involving a public inquiry (para. 89).
[7] para. 87.
[8] para. 84. It has "at times" taken an average of six months to obtain a hearing of an appeal (para. 84) and the Minister takes "three months or more" to obtain his inspector's report and make his decision (para. 88).
[9] para. 88.
[10] para. 88.
[11] s. 45 (2), Town and Country Planning Act 1962 ("1962 Act").
[12] para. 45.
[13] Limitation Act 1939, s. 2 (1) (*a*).

for his loss.[14] It would be unfair if the purchaser could be proceeded against by way of enforcement notice more than six years after the misrepresentation if he could not in turn sue his vendor.

The White Paper makes certain miscellaneous declarations of intent. Some limit may be put on the time during which planning permissions remain effective.[15] Powers are to be given for the planning authority to serve a notice stopping at once any operations which are the subject of an enforcement notice.[16] Powers to stop up and divert highways are to be improved, local new street by-laws will be abolished.[17] The protection afforded to buildings of special historic or architectural interest is to be further improved.[18] Methods of controlling development by statutory undertakers are to be examined.[19] Local authorities will not need to designate in advance land to be compulsorily acquired and they will be able to use a vesting procedure similar to that in the Land Commission Act 1967 [20] to speed up the conveyancing. No proposals appear for speeding up the delays in agreeing a price and paying compensation for land so acquired; this is a current injustice which ought to be remedied.

The proposals about development plans may be more controversial. At present a development plan must consist of a basic map, a written statement and such other map or maps as are appropriate.[21] A county will produce a county map and town maps, accompanied by programme maps showing the stages by which the development will be carried out.[22] The White Paper says that present development plans cover areas which are too small, being based on local government boundaries,[23] they concentrate on land use and do so in excessive detail.[24] "What matters far more [than keeping incompatible uses away from each other] —certainly when it comes to government level—is whether the physical environment as a whole is being properly shaped to meet evolving social and economic needs, with realistic regard to investment programmes and priorities." [25] Translated into proposals

[14] Misrepresentation Act 1967, ss. 1, 2.
[15] para. 48.
[16] para. 45.
[17] para. 48.
[18] para. 47, to supplement the Civic Amenities Act 1967.
[19] para. 28.
[20] ss. 9, 10; para. 26.
[21] Town and Country Planning (Development Plans) Regulations 1948 (S.I. 1948 No. 1767), r. 4 (1).
[22] *Ibid.* rr. 6, 12. There may in addition be separate comprehensive development area maps, designation maps and street authorisation maps. A county map will show existing and proposed special, trunk and principal traffic roads, areas of mineral working, green belt areas and areas of great landscape, historic and scientific value; town maps too contain much detail, Town and Country Planning (Development Plans) (Amendment) Regulations 1959 (S.I. 1959 No. 1581) Sched. I, Pts. I, II and III.
[23] para. 15. [24] para. 16.
[25] para. 16. The whole Paper is written in this determined "clarion call" style.

this means that a new form of plan is suggested consisting of a "structure plan," containing "action areas" which would be comprehensively treated over the next 10 years, which the Minister would approve, and "action area plans" and "local plans" which would be "adopted locally." The structure plan would be primarily a written statement of policy with a diagrammatic structure map for counties and major towns only to "expose clearly the broad basic pattern of development and the transport system." [26]

One has two main objections to the proposals. The first is that as soon as plans are proposed property values are affected, if the effect is adverse then "planning blight" grows and it is difficult to sell at a market value similar to that ruling before the proposals were made. The present law is inadequately narrow in compensating for this.[27] If the structure plan deals only with "the broad, basic pattern" then planning blight, which thrives on vagueness, will spread even quicker. The second objection is that if action area plans and local plans are prepared by a local authority which may under delegated powers also be the local planning authority, justice will hardly be seen to be done. Furthermore it is proposed that appeals against such plans should be decided by the local planning authority itself [28] and no right of appeal to the Minister is suggested. The Minister may only hold a local inquiry in a case which raises a question of fairness between the citizen and the local authority (such as a controversial plan to build council offices) [29] or he may "call in" any local plan and decide upon it himself in cases of national importance, very great controversy or unusual technical complexity.[30] This is inadequate. Speed in plan-making is not the sole consideration. The White Paper rejected a suggestion that a three-man local tribunal should deal with planning appeals on the unconvincing ground that suitable members would be hard to find.[31] The same objection could have been heard against Rent Tribunals under the Rent Act 1965 but events would have proved it unjustified. The suggestion should be re-considered. The county is not to be allowed to decide on objections to its own structure plan,[32] why should the local authority?

The Government awaits the views of interested organisations on modernising "a system of land use planning which has served well" [33] within the framework of its proposals.[34]

H. W. WILKINSON.

[26] para. 18. This follows the views of the 1964 report of the Planning Advisory Group on "The Future of Development Plans."
[27] ss. 188-151, 1962 Act.
[28] Annex to White Paper, para. 2.
[29] *Ibid.* para. 3 (2).
[30] *Ibid.* para. 3 (1).
[31] para. 35.
[32] Annex, para. 1.
[33] para. 49.
[34] para. 50.

LAW REFORM COMMITTEE: FIFTEENTH REPORT ON THE RULE IN *Hollington* v. *Hewthorn* [1]

THE decision of the Court of Appeal in *Hollington* v. *Hewthorn*,[2] affirming the rule that the judgment of a court of law is inadmissible in subsequent litigation as proof of the facts upon which it proceeded, has been the subject of sustained criticism,[3] and this Report recommends that it should be modified so as to allow proof of a criminal conviction as evidence of such facts in subsequent civil proceedings.

In *Hollington*, the defendant had been the driver of a vehicle involved in a collision with the plaintiff's car, which was being driven by the plaintiff's son at the time. The only witnesses were the two drivers. The defendant was convicted of careless driving before a magistrates' court and the plaintiff then commenced a civil action in respect of the damage to his vehicle. The plaintiff's son died before the hearing and, being unable to produce direct evidence of the defendant's negligence,[4] the plaintiff sought to establish this by proof of the defendant's conviction. Both the trial judge, Hilbery J., and the Court of Appeal rejected this evidence as being inadmissible for this purpose.

The recommendations of the Committee are:

(1) a conviction before a competent criminal court in the United Kingdom,[5] whether before magistrates or on indictment, should be admissible in subsequent civil proceedings, whether or not the person convicted is a party to those proceedings, as evidence that the person convicted was guilty of the conduct constituting the offence;

(2) the conviction should not be conclusive but the onus of proving that the conviction was wrongful should be upon the person alleging this;

(3) acquittals should not be admissible evidence that the person acquitted did not do the acts in question;

[1] Cmnd. 3391.

[2] [1943] 1 K.B. 587.

[3] *e.g.*, *Goody* v. *Odhams Press Ltd.* [1967] 1 Q.B. 333; *Barclays Bank* v. *Cole* [1967] 2 W.L.R. 166; these cases are discussed in [1967] Crim.L.R. 441; Cross, *Evidence*, 3rd ed. pp. 360 and 378 *et seq.*; Wigmore *Evidence*, 3rd ed., Vol. V, p. 687 *et seq.*; Cowen & Carter, *Essays on the Law of Evidence*, Chap. VI; Wright 21 Can.B.R. 658; Goodhart (1943) 59 L.Q.R. 299; Coutts (1955) 18 M.L.R. 281; the rule is defended by Hinton, 27 Illinois L.R. 195. There have always been a number of recognised exceptions: Criminal Procedure Act 1865, s. 6, allowing proof of convictions to discredit a witness; Matrimonial Causes Act 1965, s. 3 (1) (2); *Ingram* v. *Ingram* [1956] P. 390; *Petrie* v. *Nuttall* (1856) 11 Exch. 569. In certain cases the effect of the conviction and sentence may itself be relevant, as in the exercise of the court's discretion to pass over the defendant's personal representatives in granting probate: *Re S.* [1967] 3 W.L.R. 325; explaining *In the Estate of Crippen* [1911] P. 108. A plea of guilty would be admissible as an admission if made by a party to the action.

[4] And presumably not wishing to call the defendant.

[5] But not convictions by courts-martial or foreign courts or the findings of a coroner's inquest.

(4) in defamation actions, proof of a conviction or acquittal should be conclusive justification of a statement that the person convicted or acquitted was guilty or not guilty of the offence charged respectively;

(5) civil judgments generally should not be admissible but a finding of paternity in affiliation proceedings, or a finding of adultery in matrimonial proceedings in the High Court or in a county court,[6] should be received in evidence in subsequent civil proceedings in the same manner as convictions.[7]

The Report also contains recommendations on matters of pleading and procedure and a draft Bill is annexed giving effect to the principal recommendations.

The probative value of convictions

> The Committee approached the rule in *Hollington* v. *Hewthorn* ". . . from the premise . . . that any material which has probative value upon any question in issue in a civil case should be admissible in evidence unless there are good reasons for excluding it. Our further premise is that any decision of an English court upon an issue which it has a duty to determine is more likely than not to have been reached according to law and to be right rather than wrong. It may therefore constitute material of some probative value if the self-same issue arises in subsequent legal proceedings."

In the case itself, Lord Goddard, delivering the reserved judgment of the Court of Appeal, had rejected the evidence as offending both the rules excluding hearsay and opinion evidence.[8] The Committee accepted that the finding of a court did indeed consist of ". . . a number of component opinions." The court has no direct knowledge of the facts in question and a finding of guilt is an expression of its opinion as to the reliability of the evidence called to establish the primary facts, the possibility of drawing further inferences from those primary facts and the correct application of the law to those proved and inferred facts. The Committee, however, decisively rejected Lord Goddard's assertion that such an opinion had no greater evidential value in subsequent civil proceedings than the opinion of a mere bystander. The opinion of a criminal court as expressed in a verdict of guilty

[6] But not in a magistrates' court as the alleged adulterer has no legal right to appear and defend the allegation if not the respondent to the summons.

[7] Similar recommendations were made in the Denning Report on Matrimonial Causes (1947) Cmd. 7024 and the Report of the Royal Commission on Marriage and Divorce (1956) Cmd. 9678.

[8] [1943] 1 K.B. at p. 595. *Hinton*, *op. cit.*, stated the objection graphically: "The finding of the jury is obviously nothing more than their conclusion from the testimony produced at the trial. It is clear that the individual jurors would not be admitted to testify to their belief in the guilt of the accused because of their lack of personal knowledge. Their formal verdict would seem to be no better than their present testimony."

is only formed because it is under a duty to consider the evidence presented by both sides in the context of an inquiry where a heavy onus of proof is borne by the prosecution and where the defence enjoys a number of procedural advantages. The self-same reasons which enhance the cogency of a verdict of guilty work to deny a similar value to an acquittal, for this means no more than that the criminal court was not satisfied of guilt beyond reasonable doubt and involves no positive finding of fact. As the standard of proof in civil cases is no more than a preponderance of probability, an acquittal has no corresponding probative value.[9] The Committee was not prepared to recognise the probative value of the findings of civil judgments to the extent of permitting their use as evidence in subsequent cases. The Report stresses the fact that the standard of proof is lower in civil proceedings and that there is not the same obligation on a plaintiff, as there is on a prosecutor, to disclose evidence that may assist the defence.[10] The judge does not have the same discretion to exclude prejudicial evidence of slight probative value. The special treatment of the findings in matrimonial causes was justified by the statutory duty of inquiry imposed on the judge, and in affiliation cases, by the ". . . high standard of proof, including corroboration of the mother's evidence." These reasons are not altogether convincing. The standard of proof that prevails in a civil case is exactly the same standard that will prevail in the subsequent civil litigation. The Committee would have us believe that the findings in undefended divorce actions or the decisions of magistrates in motoring cases are more likely to represent the true facts than the findings of a High Court judge. Lord Goddard's assessment of the realities of divorce and summary litigation is more convincing.[11]

The weight to be attached to convictions as evidence

The arguments of the Committee that the findings of a criminal court are more likely to be right than wrong are convincing if there is no evidence to the contrary, but it is to be regretted that the Report does not deal at greater length with some of the practical difficulties that will arise when the correctness of the conviction is challenged. If the recommendation had been in favour of the conclusiveness of convictions, then there would be no problem. The party relying on the conviction would be entitled to rely on an irrebuttable formal mode of proof instead of having to prove his case by evidence. The Committee did not propose this, however, and, although such a result might be acceptable if confined to the

[9] *Cf. Packer* v. *Clayton* (1932) J.P. 14, *per* Avory J.

[10] The obligation is to inform the defence of the existence of the evidence rather than disclose it in detail: see cases cited in Archbold, 36th ed., para. 1874.

[11] [1943] 1 K.B. at p. 602: "With the enormous increase in divorce cases that has taken place . . . it would be impossible to inquire into more than a very small proportion . . . to say that the state has an interest in summary convictions of this sort so as to attribute particular value to them as evidence, seems to us, with respect, to be more theoretical than practical."

convicted person and persons claiming through him, for he would have had his day in court with full opportunity of making his defence and appealing against the decision, such a solution would clearly be unjust as regards a stranger to the criminal proceedings, who would have had no such opportunities.[13] It is submitted that the only substantive effect of the principal recommendation is to change the onus of proof. This, of course, is not without considerable significance. Although the actual situation in *Hollington* is unlikely to recur with any frequency, the party relying on the conviction will have an important tactical advantage and his opponent may be less inclined to resist. This could lead to earlier settlement. The Committee clearly thought, however, that the effect of the conviction would be greater in a contested case than merely shifting the burden of proof and that it would have direct probative value in itself. They indicated that something more than the uncorroborated evidence of the person convicted would be required to rebut this onus.[13] With respect, it is difficult to see how the mere fact of the conviction can justify another court, which has no knowledge of the evidence given or the arguments advanced in support of it, in rejecting the detailed evidence given before it by the opposing party. Once evidence is given, if the second court is not to abdicate its function in the matter entirely, it must assess that evidence on the merits. Professor Hinton puts the position with great force:

> "Manifestly there is no way in a given case of determining the probative value of a conviction to establish the truth of the propositions on which it was based. If there were no other evidence, we might indulge in a presumption and so settle the matter. But if there is other evidence on the questions, what effect should be given to the fact that another jury on an unknown state of the evidence arrived at a given conclusion? The present jury, if it really considers the matter, must either blindly accept the conclusion of the first jury or ignore it because there is no rational alternative. Few courts today would approve an instruction telling a jury to weigh a 'presumption' with or against the evidence,[14] for the simple reason that the thing is impossible. Any attempt to weigh the conviction involves the same difficulty. It would seem therefore that the 'archaic precedents' may not be so bad after all." [15]

So long as we accept that criminal and civil liability are to be determined in separate tribunals, it is submitted that, apart from

[13] See *Kirby* v. *U.S.*, 174 U.S. 47 (1899).

[13] They did not consider whether the conviction might itself constitute corroboration: *Mash* v. *Darley* [1914] 1 K.B. 1. There are obvious dangers in treating it as such in that it might offend the rule against self-corroboration if the party relying on it had given evidence in the criminal trial.

[14] *Cf. Coffin* v. *U.S.* (1895) 157 U.S. 432.

[15] *Op. cit.* The same point was made by Lord Goddard in [1948] 1 K.B. at p. 595. *Cf. Ingram* v. *Ingram* [1956] P. 390 at p. 402.

allowing a party to assert that prima facie the conviction is correct, and thereby putting his opponent to proof of the contrary, it is " . . . safer in the interest of justice that on the subsequent trial the court should come to a decision on the facts placed before it without regard to the result of other proceedings before another tribunal." [16]

Identification of the issues determined by the criminal court

The evidential value of a conviction, even to the extent of reversing the onus of proof, depends entirely on the possibility of identifying the issues determined by the criminal court with those before the civil tribunal. The Report suggests that this difficulty has been exaggerated—a statement that will surprise anyone who has had to address his mind to a consideration of the highly sophisticated learning that has developed in connection with the not dissimilar problem of identifying the issues determined by previous civil litigation when a question of *res judicata* arises.[17] In these cases, the second court at least has the benefit of the transcript of a reasoned judgment or the judge's note.[18] The extraction of a relevant factual or legal conclusion from the terse verdict of a criminal jury or a lay Bench would not, on the face of it, appear to be a simple task.[19] The Committee recognised that a certificate of conviction would not by itself suffice and, therefore, recommended that the information or indictment be admissible for this purpose and that interrogatories be used to identify the facts with the conduct of the party in the civil action. In certain cases this may well be satisfactory. If the defence to a claim on an insurance policy was a plea that the insured had intentionally burnt down the property, proof by these means of his conviction for arson would clearly be relevant. It is extremely doubtful whether the sort of formalised particulars set out in criminal pleadings would be sufficient in less simple cases. It is interesting to speculate how one would plead particulars of negligence in a civil claim on the sole basis of such documents. If the recommendations of the Committee's Report on the hearsay rule [20] are enacted, the transcript of evidence may be used, but this will not necessarily indicate the jury's findings. Lord Goddard observed that, in litigation arising out of a road traffic accident, " To link

[16] Lord Goddard [1948] 1 K.B. at p. 602.

[17] *Marginson* v. *Blackburn B.C.* [1939] 2 K.B. 426; *Bell* v. *Holmes* [1956] 1 W.L.R. 1359; *Randolph* v. *Tuck* [1962] 1 Q.B. 175; *Wood* v. *Luscombe* [1966] 1 Q.B. 169; and see Street (1957) 73 L.Q.R. 358.

[18] *Marginson* v. *Blackburn B.C.* [1939] 2 K.B. at p. 437.

[19] *Connelly* v. *D.P.P.* [1964] A.C. 1254, *per* Lord Morris of Borth-y-Gest at p. 1321: " . . . the conclusions in criminal cases tried on indictment are expressed either by verdicts of guilty or not guilty. The result is that issues are not isolated and analysed as they are in a judgment which specifies findings and records reasons. In very many cases, therefore, it is not possible to know or deduce whether a verdict involves a particular conclusion or determination."

[20] Cmnd. 2964.

up or identify the careless driving with the accident, it would be necessary in most cases, probably in all, to call substantially the same evidence before the court trying the claim for personal injuries." [21] The Report concedes that in such cases, which it says constitute " the commonest type of case in which there is a criminal conviction for conduct which also constitutes a civil wrong," many issues, such as contributory negligence, which were not before the criminal court, are likely to be relevant in the civil proceedings so that " it will generally be necessary . . . to call in the civil proceedings the same witnesses who gave evidence in the criminal proceedings . . ." and ". . . the abolition of the rule in *Hollington* v. *Hewthorn* is unlikely to result in much saving of time or expense."

One unfortunate consequence of the proposals of the Committee is that they will involve civil courts in a close consideration of the elements of criminal offences in circumstances where the primary consideration will not be the enforcement of the criminal law. The precedents for this are not propitious for the development of either branch of the law,[22] particularly in those cases where the same term may be used to describe different concepts in the respective jurisdictions.[23] The danger of proof by formal means rather than factual evidence is that it leads to technical and sophisticated casuistry in an attempt to avoid its effects.

Public opinion

Some of the most vigorous criticism of *Hollington* v. *Hewthorn* has been concerned with the adverse effect the decision is claimed to have on the lay public's regard for the administration of justice. The first point made in the Report is that, " Rationalise it how one will, the decision in this case offends one's sense of justice. . . . It is not easy to escape the implication in the rule in *Hollington* v. *Hewthorn* that, in the estimation of lawyers, a conviction by a criminal court is as likely to be wrong as right." [24] The maintenance of public confidence in the administration of justice is, of

[21] [1943] 1 K.B. at p. 595.

[22] See the unfortunate and undignified controversy between the Court of Appeal and the Court of Criminal Appeal as a result of the decisions in *Denyer* [1926] 2 K.B. 258 and *Hardie and Lane Ltd.* v. *Chilton* [1928] 2 K.B. 306, resolved only by the House of Lords in *Thorne* v. *M.T.A.* [1937] A.C. 797.

[23] *e.g.*, " consent " often means very different things in a criminal and a civil court: *Hegarty* v. *Shine* (1878) 14 Cox C.C. 145, *per* Ball C. at p. 147. For the purposes of the Factors Act 1889 and the Sale of Goods Act 1893, a person may be in possession of goods with the consent of the owner although guilty of larceny by a trick: *Pearson* v. *Rose and Young* [1951] 1 K.B. 275; *Folkes* v. *King* [1923] 1 K.B. 282; *Du Jardin* v. *Beadman* [1952] 2 Q.B. 712. *Cf. Oppenheimer* v. *Fraser* [1907] 2 K.B. 282. The rogue in *Cundy* v. *Lindsay* (1878) 3 App.Cas.459 was convicted of obtaining by false pretences, although no property passed for the purposes of the civil action. When criminal courts employ civil law concepts the results are no happier: *Fisher* v. *Bell* [1961] 1 Q.B. 394.

[24] This factor has been emphasised in America: *Eagle Star and British Dominions Ins. Co.* v. *Heller*, 149 Va. 82, 140 S.E. 314, *per* Prentis P.: " To sustain such a judgment would be to encourage and give support to the

course, a most important consideration in judging the merit of any law. It may be said without undue cynicism, however, that there are many rules of law that do not command the immediate respect of uninformed lay opinion. Even if the proposals of the Committee are implemented, the possibility of a civil court coming to a different conclusion from a criminal court on the same facts still exists, and the public may be led to believe that the High Court in its general civil jurisdiction is less reliable than the local Bench. The least defensible aspect of the rule in *Hollington*, however, was its effect in defamation cases which meant that one could not safely say that a person convicted and sentenced by a criminal court was in fact guilty without incurring the risk of an action.[25] The recommendation that proof of conviction by a criminal court should be conclusive justification of any statement that suggests the person charged was guilty of the offence is particularly guaranteed to ensure that the law is brought more into accord with the common sense of the matter. It will not prevent people from protesting their innocence if they claim the conviction was wrongful. It also seems just that an acquitted person should be entitled to defeat any suggestion that he was in fact guilty by proof of his acquittal, even though this might act as a restriction of the freedom to discuss unmeritorious acquittals.[26] These proposals are to be welcomed as perhaps the most significant in the Report. They will also make it more difficult to launch collateral attacks on the decisions of criminal courts by civil process,[27] which, Lord Denning has indicated, is a growing evil. "There is too much of this sort of thing going on: Hinds, Goody, Rondel and now the defendant. It is made possible by the unfortunate decision of this court in *Hollington* v. *F. Hewthorn & Co. Ltd.* . . . I hope that it will soon be altered." [28] If Parliament can find the time, it seems that Lord Denning may yet have the satisfaction of seeing the rule which he challenged unsuccessfully as counsel for Mr. Hollington reversed by statute.

MICHAEL DEAN.

REPORT OF THE NATIONAL JOINT ADVISORY COUNCIL COMMITTEE ON DISMISSAL PROCEDURES

THE problems inherent in dismissal from employment long ago parted company with the law, and it is perhaps unfortunate that

current thoughtless and carping criticisms of legal procedure, and to justify the gibe that the administration of the law is [the] only remaining legalised lottery."

[25] *Hinds* v. *Sparks*, *The Times*, July 28 and 30, 1964.

[26] *Cf. Loughans* v. *Odhams Press*, *The Times*, February 14, 1968.

[27] The prevention of such attacks is a policy which underlies a number of rules of law, *e.g.*, the denial of an action for perjury: *Hargreaves* v. *Bretherton* [1958] 1 Q.B. 45; the stringent requirements for liability in malicious prosecution: *Glinski* v. *McIver* [1962] A.C. 726; see also *Marrinan* v. *Vibart* [1963] 1 Q.B. 528 and *Rondel* v. *Worsley* [1967] 1 Q.B. 443 (C.A.).

[28] *Barclays Bank Ltd.* v. *Cole* [1967] 2 W.L.R. 166 at p. 169.

the National Joint Advisory Council's report does little to reunite them. The Committee is able to dispose of the " real " law in a little over a page, and thereafter does not feel obliged to refer to it again. As so often happens in labour relations in this country, the law's regulatory function has been taken over by collective bargaining, and it is with the latter that the report is mainly concerned. Thus the discussion of dismissal relates not just to legally wrongful dismissal, but to arbitrary or unjust dismissal for which there would be no legal remedy.[1]

In the private sector of industry, the Committee finds two different sorts of agreements relating to dismissal: those which are internal to a particular firm or group of firms, and those which are external in the sense that they are industry-wide. The former are for the most part concerned with disciplinary procedure, in which dismissal may be the last in a progression of penalties of increasing severity, though they may on occasion be used for non-disciplinary dismissals; the latter are generally not designed to deal with dismissals in particular, but with any dispute which may arise between management and workers. Internal procedures are in the opinion of the Committee " fairly widespread in large firms, especially those employing 2,000 or more," and do, where they exist, appear to keep dismissal figures down. Unfortunately the samples on which these conclusions are based provide little information about the small firm (defined in the report as one which employs less than 1,000). One can appreciate the difficulty of obtaining such information, but at the same time the failure to do so must influence one's views of the Committee's recommendations: small firms are after all less likely to be aware of the virtues of good staff relations and more likely to indulge in arbitrary dismissals than firms large enough to have their own personnel management departments. Moreover, as well as being far from random, the samples would appear to me too small to support any firm conclusions about the prevalence of agreed dismissal procedures in industry generally. The Committee itself seems to be well aware of these limitations, and it can only be regretted that, presumably because funds were lacking, yet another opportunity to base proposals for new law on such hard fact as can be obtained by sociological investigation has been lost.

Even on the basis of their " weighted " information, the Committee is able to conclude that " the proportion of all firms which have formal procedures is well below 20 per cent., and a consideration of external dismissal procedures is scarcely more encouraging. Few disputes procedures are intended to be appropriate for dismissal disputes between an employer and his

[1] There is always, of course, the extra-legal remedy of collective action, an important factor both in the collective-bargaining process and in the settling of isolated dismissal disputes. The Committee points out that in the years 1964–66 stoppages arising from dismissals accounted for approximately 8 per cent. of the total time lost from all stoppages.

employee, and access to them is usually only granted to the union, not to an individual member. Furthermore the speed which is an essential element in any effective dismissal procedure is probably lacking in a procedure which operates only at national level. On the other hand, the Committee is able to report that where the use of external machinery does result in an award, that award is "almost invariably observed," even though it may "not infrequently" be reinstatement.

In the public sector the picture is, as one would expect, very different. In many cases where a public body is the only employer for a particular industry (gas, for instance), then the distinction between internal and external procedures becomes meaningless, but the use of formal procedures of one sort or another is nevertheless almost universal, and dismissal figures are low compared with those in the private sector. Reinstatement can apparently be granted in some cases, though the Committee gives very little information on this: in the public sector, procedures are much more concerned with "how to dismiss" rather than "how to settle a dispute about dismissal," and it may be that, because the rules about the former are usually very precisely defined and closely observed, disputes, and thus the question of remedies for the employee, can seldom arise.

Having established to their satisfaction that existing procedures do not cover the whole of industry, particularly in the private sector, and that in other countries statutory schemes seem to work fairly well, the Committee advances to the assumption (which would appear to be unchallengeable) that some formal procedure is better than none, and makes two recommendations: that the concluding of voluntary agreements on dismissal procedure, both internal and external, is to be encouraged, particularly in relation to smaller firms; and that the Minister of Labour should "keep under review" the possible need for statutory machinery to supplement these voluntary agreements.

The encouragement required by their first recommendation could, the Committee feel, be provided by the Ministry of Labour's industrial relations officers, by the T.U.C., and by the C.B.I. The problem may, however, be more intractable than the Committee imagine, and may not give way to mere encouragement. On their own estimation, about 80 per cent. of all firms in the private sector have no agreed internal procedure for dismissal, and this figure must include the majority of smaller firms. The small employer of unskilled labour, particularly in times of relative unemployment, will have no incentive to enter into such agreements. Furthermore, even if encouragement were effective, since the Committee suggests no change in the common law, the worker subject to an agreed procedure would appear to have only marginally more legal protection than he has if he is not so subject, for the law on dismissal is clearly to the effect that the employer is liable

only if he is in breach of contract, and that in that event the employee is entitled only to damages for loss of earnings. Thus the employee dismissed in contravention of an agreed procedure would have to show that the procedure, whether internal or external, was part of his contract of employment before the court could grant him any relief, and even if this was established he could not presumably enforce a clause which provided for reinstatement, since this would amount to specific performance, a remedy which the courts have not given to a dismissed employee for something like 200 years. Nor is it likely that the employee would be entitled to damages exceeding his loss of earnings because his dismissal was in breach of an agreed procedure clause incorporated into his contract which purported to give him a right to reinstatement. These arguments may not apply with equal force in the public sector, since reinstatement has on occasion been allowed here, but the employee would still have to show that the agreed procedure was part of his contract of employment, and as well as that may have to persuade the court that his contract could be equated with the statutory or quasi-statutory definitions of the public bodies' powers of dismissal, on the exceeding of which cases such as *Vine* v. *National Dock Labour Board* [2] and *McClelland* v. *Northern Ireland General Health Services Board* [3] are based. It is also very probable that civil service employment would not be treated in the same way as employment by an independent public body, since whatever procedures had been agreed, the civil servant may still be dismissible at will.

Though it was understood that the Committee did originally intend to recommend the setting up of special dismissal tribunals, no such recommendation appears in the report. Instead the Committee are content to leave the matter in the hands of the Minister of Labour, with the proviso that if statutory tribunals are introduced they should take the form outlined in the report. One of the reasons advanced for this is convincing enough: the Royal Commission on Trade Unions and Employers' Associations will no doubt have recommendations to make about the setting up of labour tribunals which may supersede those of the Committee. But both in their failure to recommend the creation of any new tribunals and in their concept of the form which such tribunals should take if the Minister does eventually find that they are necessary, the Committee has in mind a much more traditional and somewhat less acceptable reason.

The statutory machinery which they envisage is to be set up only where, in the opinion of the Minister of Labour, no adequate voluntary arrangements already operate. This is very much in the pattern of existing "collective-agreement legislation," such as the Wages Council Acts, and it is understandable that the Committee

[2] [1957] A.C. 488.
[3] [1957] 1 W.L.R. 594.

should want to devise a scheme which was, on the best authority, peculiarly appropriate to industrial relations in this country. Nevertheless one would have been more convinced that their approach was the correct one if they had been able to advance some evidence, or even a suggestion, that the " wages councils " philosophy is effective to bring about its alleged objects, namely, the protection of the unrepresented worker until such a time as the unions are ready to take over by negotiating voluntary agreements. It is often said that the ultimate success of a wages council is signified by its demise: if this is true, then few can be counted successful.[4] Both the wages council legislation and the Committee's recommendations are based on two premises: that voluntary machinery is better than statutory intervention [5]; and that the proposed interstitial tribunals will have the effect of encouraging the growth of agreed formal procedures. Both premises are not now unquestionable, and it may be that the fear of statutory intervention often expressed by both trade unions and management has been too indiscriminate. Few people would after all criticise the redundancy payments scheme or the Contracts of Employment Act solely on the grounds that they originated in statute-law rather than in voluntary negotiations; and even if one accepts that collective bargaining is " better," the fact that the superior advantages it can offer are enjoyed by the employees of only 20 per cent. of all private firms might lead one to conclude that, at least in quantitative terms, legislation could do the job more effectively.

The Committee sees the tribunal's function as one of conciliation rather than adjudication, and as a result recommends that this jurisdiction should not be given to the industrial tribunals set up under the Industrial Training Act 1964. Instead, a dismissal dispute should go first to a statutory official (attached to the Ministry of Labour) whose job it would be to establish the facts and if necessary act as conciliator. Failing a settlement at this stage, the parties could have recourse to an impartial tribunal of representatives from both sides of industry, whose chairman need not be legally qualified. Where appropriate the tribunal could attempt conciliation, whether or not the statutory official had already done so. In order to enhance their flexibility, the Committee would require the tribunals to observe very few rules, whether substantive or procedural, though an obvious exception in the former category would be the International Labour Conference's Termination of Employment Recommendation.[6] The distinction between the present industrial tribunals, operating rather like ordinary courts within the framework of detailed statutory provisions, and the more flexible, less judicial procedure required for dismissals is surely

[4] This is not, of course, to say that they do not perform a useful function.
[5] The Committee's exclusion from all protection, statutory or otherwise, of the voluntary non-member of a union is very strong evidence of this attitude.
[6] 1963, No. 119.

a valid one, even if it does result in a proliferation of labour courts and tribunals. Perhaps the Donovan Commission will be able to suggest a more rational system.

The emphasis on conciliation has, however, led the Committee to a conclusion which is perhaps unfortunate. Because of the refusal of the courts to grant specific performance, it felt unable to recommend that the tribunals should have the power to order reinstatement where both parties to the dispute do not agree to it. It seems likely that in many cases reinstatement will be the only appropriate remedy, and the fact that it is frequently part of an agreed procedure would indicate that both sides consider it useful. Thus the employee, even though the suggested scheme would give him a forum in which to voice his grievances and the chance of compensation for unjustified rather than only wrongful dismissal, is still in this one respect under a legal disability.

JUDITH REID.

NOTES OF CASES

Professional Ethics and Restraint of Trade

Every professional body has its own ethical code which seeks, *inter alia*, to promote its welfare, interests and status. The rules or principles which aim at achieving these objectives very often involve restraints of trade. Thus, among the most common bars to a profession are advertising and undercutting—these activities which are indeed laudable in the business world (so much so that their restraint is prima facie contrary to public policy) are, whether rightly or wrongly, considered offensive and disgraceful professionally. Can an ethical rule which is arbitrary and capricious be challenged by a declaration and an injunction? Does the doctrine of restraint of trade apply to professional bodies? These two questions were considered in *Dickson* v. *Pharmaceutical Society of Great Britain*.[1]

In the instant case, the plaintiff, a retail director of "Boots," challenged by a declaration and an injunction a proposed rule of the Pharmaceutical Society of Great Britain [2] which sought to limit the range of non-pharmaceutical goods sold in chemists' shops on the ground that it was in unreasonable restraint of trade and contrary to public policy. Pennycuick J. in the court of first instance granted a declaration and an injunction on the ground that such a rule would operate as an unjustified restraint of trade. The appeal was dismissed by the Court of Appeal.

Lord Denning M.R. considered the main point whether the issue was a justiciable one for the purpose of the remedies of declaration and injunction. It is clear that the said remedies are available where there is a justiciable issue, *viz.*, an infringement of the right of property or contract.[3] Is a matter which concerns a rule of professional conduct a justiciable issue? This question was considered in *Cox* v. *Green*.[4] There, the plaintiff and the defendant were medical practitioners. The plaintiff had previously acted as a *locum tenens* for the defendant's then partner, a Dr. Killen. The defendant complained that the plaintiff had acted contrary to "Medical Ethics" [5] in respect of setting up a medical

[1] [1967] Ch. 708; [1967] 2 W.L.R. 718; [1967] 2 All E.R. 558.

[2] The Society is incorporated by Royal Charter in 1843, now replaced by a Royal Charter of December 31, 1953. The Society controls the professional activities of pharmacists.

[3] See *Nixon* v. *Att.-Gen.* [1930] 1 Ch. 566; *Guaranty Trust Co. of New York* v. *Hannay & Co.* [1915] 2 K.B. 536.

[4] [1966] 1 Ch. 216.

[5] The particular rule of conduct relating to the setting up of medical practice was contained in the British Medical Association Handbook 1963 at pp. 59–60. The particular section provides *inter alia* a restrictive covenant precluding practice for an agreed time in a defined area by a partner, assistant or *locum tenens* after the termination of the contract.

practice and brought the issue to the attention of the Central Ethical Committee of the British Medical Association. But, before the matter could be considered by the Committee, the plaintiff applied to the court for a declaration *inter alia* that he had been acting in accordance with those rules. The defendant took out a summons to strike out the statement of claim as disclosing no cause of action. Plowman J. decided in favour of the defendant on the ground that there was no justiciable dispute between the parties. He said:[6]

> "The issue between them does not concern any right of property; it does not concern any right of contract; it does not concern any legal right. The question is purely whether the plaintiff, as the defendant alleges, has been guilty of unethical conduct in a professional way."

It would appear that rules of professional conduct are analogous to a "gentleman's agreement" and cannot be sued upon as a contract since there is no "intention to create legal relations." Let it be supposed that a pharmacist or a particular chemist chooses to ignore the rule if implemented and sells non-traditional pharmaceutical goods. If according to the Pharmaceutical Society, he has breached a professional rule it would seem, on the authority of *Cox* v. *Green*, that the courts would leave the matter to be decided by the disciplinary body of the Pharmaceutical Society subject to appeal to the High Court. Courts, however, have not pursued the notion of "gentleman's agreement" to its logical conclusion. They have, for example, held that a rule which purports to oust the jurisdiction of the courts is invalid [7] on the ground of public policy even though this might be considered analogous to a "gentleman's agreement." Again, courts have declared that they have jurisdiction to declare a rule invalid if it is "arbitrary and capricious." In *Nagle* v. *Feilden*,[8] for example, the Court of Appeal, taking a very liberal view, indicated that the remedies of declaration and injunction might lie against the stewards of the Jockey Club who refused to grant a licence to a woman horse-trainer because she was a woman. The case is particularly significant because the plaintiff, Mrs. Nagle, did not stand in contractual relationship with the stewards of the Jockey Club. The basis of the court's intervention rested on a very broad principle that it affected a person's "right to work."

Whatever may be the position of the plaintiff in the instant case had he breached the particular rule when implemented, it seems clear that the court has jurisdiction to inquire into the validity of the rule even at the stage before implementation and to

[6] [1966] 1 Ch. 216 at p. 221.
[7] *Lee* v. *Showman's Guild* [1952] 2 Q.B. 329; *Baker* v. *Jones* [1954] 1 W.L.R. 1005.
[8] [1966] 2 W.L.R. 1027. See also, *Boulting* v. *Association of Cinematograph* [1963] 2 Q.B. 606; *Eastham* v. *Newcastle United Football Club* [1964] Ch. 413.

declare whether the proposed rule is valid or not: if invalid, it can grant an injunction to prevent it from coming into effect. According to the court, such a rule would be invalid if it is unreasonable.

The question whether the proposed new rule which the Society sought to forbid the selling of non-traditional goods is reasonable or not must be considered in the context of the law of restraint of trade since it involves the trading activities of the pharmacist. It was pointed out by Lord Denning M.R. that the doctrine of restraint of trade applied even though he could find no authorities regarding its application to professional bodies. Recent cases have exploded the myth that the categories of restraint are closed [9] and the instant case is yet another example of the court's willingness to extend the categories. However, it is interesting to note Lord Denning M.R.'s approach [10] in holding that the restraint of trade doctrine applied. He resuscitated the distinction made by Parker C.J. in 1711 in *Mitchell* v. *Reynolds* [11] between "voluntary" and "involuntary" restraints: the latter "fall under the general principle of the common law that all restraints of trade . . . if nothing more appear are bad." [12] His lordship regarded the proposed new rule as an "involuntary" restraint for the reason that only 5,026 out of a total of 29,004 members voted for it. (1,846 voted against it while 22,242 did not vote at all.) Be that as it may, his lordship's approach suffers from the same sterile distinction as that between "partial-general" restraint and that between "restraint of the particular use of land—personal restraint." [13] However, despite the distinction drawn by his lordship, he did not appear to have regarded a "voluntary" restraint as necessarily falling outside the doctrine of restraint of trade. Perhaps it would have been more appropriate to have considered this question in the context of "reasonableness" [14] rather than in the determination of the applicability of the doctrine.

It is interesting to note a slight re-phrasing of the doctrine in the present context. Thus Lord Denning M.R. said: [15]

> "It is valid if it is reasonable in the *interests of the profession* and also reasonable in the interests of the public: but it is invalid if it is unreasonable."

The modification of the first limb of the doctrine is necessitated by the fact that the "reasonableness" test is not considered in

[9] *Esso Petroleum Co. Ltd.* v. *Harper's Garage (Stourport) Ltd.* [1967] 2 W.L.R. 871; *Bull* v. *Pitney-Bowes Ltd.* [1967] 1 W.L.R. 273.

[10] Danckwerts L.J. agreed with his lordship. Sachs L.J. on the other hand held that the doctrine was applicable to the case as the restraint was of a nature as to "forbid a man selling articles from his premises."

[11] 1 P. Wms. 181.

[12] *Ibid.* at pp. 185–186.

[13] The recent cases on tied-garages. See, for example, *Esso Petroleum Co. Ltd.* v. *Harper's Garage (Stourport) Ltd.* [1967] 2 W.L.R. 871; *Petrofina (Gt. Brit.) Ltd.* v. *Martin* [1966] 2 W.L.R. 818.

[14] *Infra.*

[15] [1967] 2 W.L.R. 718 at p. 731.

reference to parties standing in contractual relationship as that envisaged by the doctrine. Consequently, questions relating to the type of interests meriting protection may be different. For, the "interests of the profession" as a whole of which the plaintiff is a member must be considered. These may relate to questions of "honour," welfare, and suchlike notions rather than the traditional notion of the protection of "proprietary" interests as found in covenants between vendor-vendee or employer-employee.

In the instant case, the Pharmaceutical Society suggested three ways in which the interests of the profession may be affected by the sale of non-traditional goods. First, pharmacists may be distracted from their pharmaceutical work; secondly, the number and quality of new entrants into the profession may be affected; thirdly, the status of the pharmacist may suffer. However, the court held that the three suggestions were not supported by evidence. Be that as it may, Lord Denning M.R. stated that even if it were shown that the selling of non-traditional goods affected the profession adversely, the proposed rule was not a reasonable way of dealing with the mischief as it was too "arbitrary and capricious." All the members of the court came to the conclusion that to limit the sale of traditional goods would be against the public interest for the reason that a number of smaller pharmacies would have to close down for economic reasons. Secondly, it would in the long run diminish the prospects of such salaries being paid to pharmacists as best attract new entrants into the profession with the consequence of increase in prices charged for dispensing to private customers and the National Health Service alike. It would also reduce the incentive of the existing pharmacies to meet the wishes of the public. It is interesting to note that the court took upon itself to consider the question of public policy even though the case could have turned on a technical point in that the Society had refused to plead the circumstances which might justify the restraint. It indicates that courts are now more confident and competent to adjudicate on issues of public policy in the area of restraint of trade.

Pharmacy is a profession which is engaged in trading. To what extent should the doctrine of restraint of trade be extended to professions which are not engaged in trade, as, for example, the architectural and legal professions? Although Lord Denning M.R. and Danckwerts L.J. were confident that the restraint of trade doctrine would apply to all professional bodies, Sachs L.J. expressed himself in more cautious language. His lordship remarked: "How far the law as to restraint of trade can by analogy extend to a profession that does not engage in trade is a different matter." [16] Suppose the Architects' Registration Council were to forbid an architect from simultaneously carrying on business as a house-agent and the Bar Council, a barrister from being engaged as a solicitor,

[16] [1967] 2 W.L.R. 718 at p. 740.

would the doctrine of restraint apply? It seems clear that, while such conduct may be regarded disgraceful by members of the respective profession, this in itself may be irrelevant for the purpose of the doctrine of restraint of trade. Support for this view can be found in Devlin J.'s (as he then was) statement in *Hughes* v. *Architects' Registration Council of U.K.* when he said: [17]

> "But there is something more important than the standing of a profession . . . There is the right of every man to earn his living. . . ."

A professional man may well be versatile in other jobs and if it can be shown that the public needs the services of such a person it could be argued that any ethical rule prohibiting him from engaging in other work would be unreasonable against public policy. This is not to say that the law will ignore the efforts of a professional body in eradicating undesirable practices. The balance which the law aims at is perhaps well put by Danckwerts L.J. in the instant case when he said: [18]

> "Of course, the rules or principles of professional bodies very often do involve restraints of trade. But these restraints are justified either by preventing undesirable operations by the members or to protect them in their livelihood, and to prevent the public with whom they have to deal being deprived of efficient and honourable service."

Dickson's case is a welcome authority both as widening the categories of restraint of trade and as displaying a willingness and ability in grappling with issues of public policy.

K. L. KOH.

LABOUR-ONLY AND SAFETY

LABOUR-only sub-contracting has two implications for industrial safety. Small firms and the self-employed may only too often be either unable or unwilling to take proper precautions; and if an accident occurs the victim, whether self-employed or employed by an uninsured sub-contractor, may find himself without an effective remedy.[1] Two recent decisions, however, have shown that the courts may be prepared to look at the realities of the situation and (pending legislation to deal with the whole matter) provide a remedy in damages where they can.

In *McArdle* v. *Andmac Roofing Co. and Others* [2] the plaintiff was employed by the first defendants. The second defendants, Pontins, had undertaken building work at a holiday camp at Blackpool which involved converting a flat-roofed one-storey building from a dining-hall into a billiard hall. There were two parallel roof lights measuring about 100 feet by 8 feet, raised from the

[17] [1957] 2 Q.B. 550 at p. 556. [18] [1967] 2 W.L.R. 718 at p. 734.
[1] (1967) 30 M.L.R. 6. [2] [1967] 1 W.L.R. 856; [1967] 1 All E.R. 583 (C.A.).

roof by a side coaming 18 inches high. The glass in those strips had to be removed and replaced by composition boards. This part of the work they sub-contracted to the third defendants, Newton Brothers. The first defendants' men were to follow them along covering the boards with strips of felt, bitumen and chippings. As the work progressed, therefore, there was a gap in the roof where the glass had been removed and where the composition boards had still to be laid. Just after twelve noon on April 28, 1962, Newtons' men left for a break without warning the plaintiff or other employees of Andmac. The plaintiff was moving along the roof backwards or sideways pouring out the bitumen from a bucket when he came to the open edge of the unfinished boarding; he fell over carrying the bucket with him and received what were described as " appalling injuries," assessed by the trial judge at £18,000.

On these facts the trial judge and the Court of Appeal held that Andmac were clearly liable as the plaintiff's employers both at common law and for breach of regulation 80 of the Building Regulations 1948. Newtons were liable because their employees had left work without taking any precautions against an easily foreseeable danger; they neither put up a barrier of any kind nor warned Andmac's men that they were going. Sellers L.J. described this as an act of callous indifference.

Pontins were also held to be liable to the plaintiff, primarily because they had assumed the overall organisation of the job and had not parted with control of it to anyone. Their engineer, Mr. Armistead, had directed when and where the work was to be done and on occasions had given orders how it was to be done. He accepted that it was his duty to co-ordinate the activities of the various sub-contractors on the site, all of whom with two exceptions (including Andmac but not Newtons) were to supply labour only. It is not often that in an action for negligence a plaintiff succeeds in establishing a new head of liability under the general principles of *Donoghue* v. *Stevenson* [3]; but the broad ground of Sellers L.J.'s judgment is that on the facts of this case both Newtons and Pontins were under a duty to the plaintiff to apply their minds to the dangers that would arise in the course of the work and they failed to do so.

The analogy with the threefold duty of care as between master and servant is obvious. Pontins' primary responsibility was to co-ordinate—in other words to organise a safe system of work exactly as it would have been if everyone on the site had been employed directly by them.[4] They also had a duty to provide proper equipment, for example something to erect as a barrier round the hole in the roof when necessary, or at very least to see that Newtons did so. (It was not argued that they were under any

[3] [1932] A.C. 562.
[4] *Wilsons and Clyde Coal Co.* v. *English* [1938] A.C. 57.

separate duty to provide a safe place of work; though a head contractor might in any of these cases be liable within limits under the Occupiers' Liability Act.)

There is also a clear suggestion that the court would have been prepared if necessary to hold Pontins vicariously liable for the negligence of Newtons.

> "It was said in argument, and I think rightly, that the Newton men were as nearly servants for the time being of Pontin, using Pontin's material and laying it as Pontin desired, as could be found short of their being held to be their temporary servants. It was not pleaded or contended that the Newton men should be treated as temporary servants of Pontin, although so to have treated them might have fitted in much better with all the statutory provisions and regulations for safety. As Mr. Clothier submitted on behalf of Andmac, the larger unit, as is to be seen in the case of large main contractors, employing a labour force directly of skilled and unskilled, are better able to meet the obligations as to safety and welfare which statutory provisions and reasonable care demand. Co-ordination where there are multiple trades (even only a few) and varying activities on the one site seems essential for safety. This falls normally on the main contractor, who can allocate work and responsibility between sub-contractors." [5]

Similarly, Edmund Davies L.J.:

> "Had Newton's men been in the direct employment of Pontin there could be no doubt as to the liability of the latter. Having regard to all the circumstances, does the fact that Newton were independent contractors relieve Pontin of all responsibility? In my judgment, it does not." [6]

After all, it is difficult to say that the enterprise they were engaged on was less hazardous than that of taking flashlight photographs in a cinema [7] or thawing a pipe with a blowtorch.[8]

Again, as in the master and servant cases, both the test of control and the test of integration were invoked in the present case. The court accepted that where a number of men were working together it was plainly desirable that responsibility for safety precautions should be firmly placed on the head contractor who was in the best position to discharge it. In this case the plaintiff was an employee of a sub-contractor, but there seems no reason to suppose that the result would have been different if he had been a self-employed workman or, for example, one of the two partners who traded together as Andmac. If the realities of the situation are looked at, such a workman who comes on the site with nothing but his own personal tools is very much in the position of a servant except for the manner in which he is paid. Ever since *Matthews*

[5] *Per* Sellers L.J. at p. 361.
[6] At p. 369.
[7] *Honeywill and Stein* v. *Larkin* [1934] 1 K.B. 191 (C.A.).
[8] *Balfour* v. *Barty-King* [1957] 1 Q.B. 496.

v. *Kuwait Bechtel Corporation* [9] it has been clear that the servant could sue for personal injuries in contract as well as in tort; there seems no good reason why the so-called independent contractor should not be able to sue in tort as well as in contract.[10]

A somewhat similar situation arose in *Donaghey* v. *P. O'Brien & Co.*,[11] but here it fell to be considered in the context of the Building (Safety, Health and Welfare) Regulations 1948.[12] The plaintiff had been working on the roof of a hangar which was covered with asbestos sheets, some of which had been removed. In order to move another, he stood with one foot on one of the purlins and the other on the sheeting. No ladders or crawling-boards were provided and when the sheet he was working on came free the plaintiff lost his balance and fell through the open space to the ground.

Here again the plaintiff's immediate employers, the first defendants, were clearly in breach of their duty under the regulations but were uninsured and insolvent.[13] They were sub-contractors to the second defendants, who were in turn working for the main contractors on the site. James J. at first instance held that the second defendants were not negligent at common law (because the necessary equipment was available on the site and the first defendants' foreman allowed their employees, including the plaintiff, to work without using it); and this was not challenged on appeal.

The House of Lords held in the end (reversing the Court of Appeal) that on the facts there had been a breach of regulation 31 (3) [14]: but the plaintiff could only recover if the second defendants had been under a duty to comply with it.

This depended on the interpretation of regulation 4:

[9] [1959] 2 Q.B. 57; and see *Govett* v. *Radnidge* (1802) 3 East 62.

[10] Indeed, he may fail in contract where he could succeed in tort: see *Quinn* v. *Burch Bros.* [1966] 2 W.L.R. 430, 1017 (C.A.).

[11] [1966] 1 W.L.R. 1170 (C.A.); *sub nom. Donaghey* v. *Boulton & Paul Ltd.* [1967] 3 W.L.R. 839; [1967] 2 All E.R. 1014 (H.L.).

[12] S.I. 1948 No. 1145; Redgrave, 20th ed. p. 479.

[13] Lord Dilhorne at the beginning of his speech drew attention to the consequences of permitting small firms such as the first defendants to operate without insurance: "If P. O'Brien & Co. are without funds and were not insured, the appellant will only recover compensation for the serious injuries he received if he succeeds in this appeal. It is perhaps a matter which should receive consideration by the legislature whether employers who employ men to do work of the character of that on which the appellant was engaged should not be required to insure against claims of the nature brought by the appellant, for in the absence of insurance an injured workman may not get the compensation to which he is entitled."

[14] "Where work is being done on or near roofs or ceilings covered with fragile materials through which a person is liable to fall a distance of more than 10 feet—(a) where workmen have to pass over or work above such fragile materials, suitable and sufficient ladders, duck ladders or crawling boards, which shall be securely supported, shall be provided and used; . . ." Compare now reg. 36 of the Construction (Working Places) Regulations 1966, S.I. 1966 No. 94 Redgrave, 21st ed. p. 641.

> "It shall be the duty of every contractor and employer of workmen who is undertaking any of the operations to which these regulations apply . . . (ii) to comply with such of the requirements of regulations 81 to 88 . . . as relate to any work, act or operation performed or about to be performed by such contractor or employer of workmen." [15]

Were the second defendants "performing" the work? As in *McArdle* v. *Andmac* [16] they had several gangs working under them and if anyone was in overall charge of the operations it was their foreman. Although their foreman in evidence had said that he had left the details of the work to O'Briens' foreman "because he was a qualified man to do the job as regards sheeting," the House nevertheless held that the second defendants had not divested themselves of control of the work and accordingly they were "performing" it. This was in fact the exact ground on which Pearson J. had decided *Mulready* v. *Bell*.[17] In that case however the Court of Appeal had held that the superior contractor could never divest himself of his responsibility under regulation 4 (ii) by sub-contracting the work. This has been disapproved and the liability of the head contractor will now depend on whether the terms of the sub-contract do or do not permit him to supervise the sub-contractors' operations from the point of view of safety. This test, even if in a sense more realistic, may well be more difficult to apply; once again such terms are likely to be implied rather than express and will require to be spelled out from the evidence of the persons involved as to how they actually organised the work.

Although the wide interpretation given by the House to regulation 81 (8) is much to be welcomed (and is in striking contrast to many of the recent cases on section 14 of the Factories Act), the overall effect of the decision can only be to reinforce the current trend towards basing liability exclusively on the concepts of control and fault. In any event it will be of no assistance to the self-employed workman or to the independent contractor himself so long as the decision of the Court of Appeal in *Herbert* v. *Harold Shaw Ltd.* remains.[18] If such men are injured at work, it may well be that their prospects at common law will be better.

G. DE N. CLARK.

AN IMPLIED CONDITION IN MOTOR-CAR HIRE-PURCHASE

THE ambiguity and uncertainty of the word "condition," as it is used in the law of contract, are notorious. In addition to the familiar distinction between conditions and warranties, English

[15] Reproduced in the Construction (General Provisions) Regulations 1961, reg. 8; and the Construction (Working Places) Regulations 1966, reg. 8.
[16] [1967] 1 W.L.R. 856.
[17] [1958] 2 Q.B. 117 (C.A.).
[18] [1959] 2 Q.B. 188.

law knows the more natural meaning of a condition as an uncertain event on the occurrence of which liability is conditional. The decision of the Court of Appeal in *Bentworth Finance Ltd.* v. *Lubert* [1] is of interest in that it rests on the discovery of an implied condition of this latter kind in a contract of hire-purchase.

The plaintiff finance company had entered into a contract with the first defendant for the hire-purchase of a motor-car. The plaintiffs delivered the car, but failed to deliver the log-book. The defendant consequently refused to pay any instalments under the contract, and neither licensed nor used the car. The plaintiffs repossessed the car and sued the defendants for arrears of instalments and for damages on account of physical damage to the car which had occurred between the date of delivery and the date of repossession. The second defendant was sued on his promise to indemnify the plaintiffs against loss arising out of their contract with the first defendant. The Court of Appeal decided against the plaintiffs on all their claims. The court held that there was an implied suspensive condition that the log-book should be provided and that in its absence the contract never came into operation at all. This conclusion clearly negatived any question of liability on the part of the defendant hire-purchaser. The court also held that on the construction of the contract of indemnity the indemnifier was not liable in these particular circumstances.

No great difficulty arises in relation to the opinion of the court that the production of the log-book is an essential element in the hire-purchase of a motor-car. There are limits to its importance: the log-book is not a document of title,[2] nor is it a document whose possession by a person other than the owner estops an owner who has consented to such possession from denying the right of disposition in that other person.[3] But it has been established that the sale of a car without a log-book is, by virtue of the absence of the log-book from the transaction, not a disposition by a mercantile agent in the ordinary course of business within the meaning of section 2 of the Factors Act 1889.[4] Indeed, the conduct of the defendant in this case in refusing to pay the instalments except on production of the log-book is little more than the conduct recommended to a prudent purchaser by a far-sighted Scrutton L.J. in 1922,[5] and endorsed nearly three decades later by Denning L.J. in *Pearson* v. *Rose & Young Ltd.*[6] Even if there were neither dicta nor decided cases on the importance of the log-book in transactions involving the disposition of title in motor-cars, it could hardly be doubted that the

[1] [1967] 3 W.L.R. 878; [1967] 2 All E.R. 810.
[2] Under s. 1 (4) of the Factors Act 1889: *Joblin* v. *Watkins & Roseveare (Motors) Ltd.* [1949] 1 All E.R. 47.
[3] *Central Newbury Car Auctions Ltd.* v. *Unity Finance Ltd.* [1957] 1 Q.B. 371.
[4] *Pearson* v. *Rose & Young Ltd.* [1951] 1 K.B. 275; *Stadium Finance Ltd.* v. *Robbins* [1962] 2 Q.B. 664.
[5] *Folkes* v. *King* [1923] 1 K.B. 282 at pp. 299–300.
[6] [1951] 1 K.B. 275 at p. 289.

application either of the doctrine of *The Moorcock* [7] or of the test of trade usage would necessarily have led any court to imply a term relating to the log-book in a contract which was silent on the point.

Easy as it is to see, however, that there must be an implied term in a contract of motor-car hire-purchase relating to the log-book, it would appear to be less simple a matter to determine the precise nature of that term. In the *Bentworth Finance* case Lord Denning M.R., with the unanimous concurrence of the Court of Appeal, regarded the term requiring the production of the log-book as a suspensive condition, or condition precedent, the failure of which entailed the result that " until the log-book was provided, there was no contract of hire-purchase at all." Presumably, therefore, the Lords Justices considered the term implied to relate to a condition the non-fulfilment of which gave rise to liability on neither side. It is respectfully submitted, however, that to state the issue in this manner, without clarification, is likely to give rise to considerable difficulty.

To some extent the difficulty arises from a lack of precision in the terminology of conditions precedent. There are at least two distinct situations, affected by vital differences in the respective rights and duties of the parties, in which it can be said that, according to the authorities, the failure of a condition precedent or suspensive condition prevents the contract from coming into operation at all. This can be and has been used, for instance, to describe the effect of the phrase " subject to contract," the effect of which is generally held to be that no obligation arises at all, until a formal agreement has been entered into.[8] When a provisional agreement is expressed to be subject to contract, it is trite law that either party may withdraw without making any effort towards entering into such a formal agreement as the conditionally phrased qualification appears to envisage.[9] But the statement that the failure of a suspensive condition or condition precedent prevents the liability from arising can also describe the situation where the parties, far from being under no obligation at all, are bound to await the outcome to see whether or not the condition is fulfilled, and even to facilitate the fulfilment of the condition to the extent to which it lies in their power to do so.[10] In this type of case, the failure of the condition may no doubt lead to the result that the rights and duties of the parties are dissolved *ab initio*; but clearly the statement that such a contract never came into operation at all would be misleading.

It is submitted that, notwithstanding the judgments of the

[7] (1889) 14 P.D. 64.

[8] *Trans Trust S.P.R.L.* v. *Danubian Trading Co. Ltd.* [1952] 2 Q.B. 297 at p. 304, *per* Denning L.J.; *Chillingworth* v. *Esche* [1924] 1 Ch. 97 at p. 111 and pp. 114–115. But see Stoljar in (1953) 69 L.Q.R. at p. 490 and *Anson on Contract*, 22nd ed., p. 121n.

[9] *Chillingworth* v. *Esche* [1924] 1 Ch. 97; *Anson on Contract*, 22nd ed., p. 54.

[10] *Mackay* v. *Dick* (1881) 6 App.Cas. 251.

Court of Appeal, the suspensive condition in this case, that the log-book should be provided, must be regarded as belonging to the latter type of condition, where the parties are under some obligation at the outset, rather than to the former. If the implied condition that the log-book is to be produced were to be regarded as equivalent to the insertion of the phrase " subject to contract," this would mean that the signing and acceptance of the contract by both sides placed the finance company under no obligation to proceed with the transaction until the log-book should become available; on the hire-purchaser's side, so to hold would have the consequence that the hire-purchaser of a car, the log-book of which had, for instance, inadvertently been left in the possession of the person from whom the dealer had purchased the car, would necessarily enjoy a *locus poenitentiae* which, until the log-book was actually produced, would enable him to repudiate the contract entirely, without waiting for a reasonable time for its production. But it is, surely, hardly conceivable that the Court of Appeal meant to suggest this; it would represent an unexpectedly revolutionary approach to the theoretical basis of the common law of contract to suggest that the completion of the formalities of a hire-purchase agreement before delivery had taken place resulted, unless the contrary were expressed, only in an inchoate contract which was binding on neither party.

But even if the decision of the Court of Appeal that the contract never came into operation at all is not taken as denying the existence of a limited obligation, binding the parties to await the fulfilment of the condition and to facilitate its fulfilment in so far as it lay in their power to do so, the judgment of Lord Denning M.R. would seem to imply still that the production of the log-book was not an obligation which normally rested on the owner. If the owner were regarded as implicitly undertaking to provide the log-book, then his failure to do so would be a breach, and the situation could not conceivably be described as being one where " there was no contract of hire-purchase at all," since the hire-purchaser would clearly have a contractual right to sue for damages. But surely justice and principle both require that the owner should normally be understood to have undertaken to provide the log-book? The importance of the log-book in this context relates to its value as evidence of title.[11] The obligation to make a good title in a contract of hire-purchase falls on the owner: both by statute and at common law he is taken to promise that he has a right to pass the property in the goods.[12] If the obligation to make a good title already rests on the owner, there can, it is submitted, be little rhyme or reason in exempting him from the liability for not providing the evidence of title vital to the transaction.

[11] *Pearson* v. *Rose & Young Ltd.* [1951] 1 K.B. 275 at p. 289.
[12] *Karflex Ltd.* v. *Poole* [1933] 2 K.B. 251; Hire-Purchase Act 1965, s. 17 (1). *Cf.* the Sale of Goods Act 1893, s. 12 (1).

Were it not for the apparent insistence by the Court of Appeal that the contract never came into operation at all, it would, of course, have been easy to understand the reference to a suspensive condition in the sense in which that term is used with regard to the effects of failure of performance by the parties to a contract. The question whether such failure by one party releases the other party from liability can be posed as one whether or not the performance in respect of which the party in breach has failed was a condition precedent to the other party's liability.[13] But in such circumstances there is no question of the contract not being operative; the failure of performance is, after all, usually a breach of the contract.[14] If this is the reasoning which underlies the judgments, the simple and unexceptionable *ratio* of the decision would be that the liability of a hire-purchaser of a motor-car is, in the absence of contrary stipulation, conditional on the delivery of the log-book as well as of the car. It would be a suspensive condition of the contract that the log-book should be produced to the extent that the liability of the hire-purchaser only, and not the whole contract, would be conditional on the provision of the log-book. It is submitted that, in view of the difficulty which results from taking the judgments at their face value, the case is best interpreted in this way.

A. R. CARNEGIE.

THE MORALITY OF ADVERSE POSSESSION OF LAND

EARLIER this year, a technical doctrine of the land law had the unusual distinction of capturing the public imagination by achieving some prominence in the national newspapers. The doctrine was that of acquisition of title to land by adverse possession, familiarly known as squatter's title, and the case in which it featured was the Court of Appeal's decision in *Hayward and Another* v. *Chaloner*,[1] in which the Lords Justices made some trenchant criticisms of a successful claim to a squatter's title.

The claim was by a Nottinghamshire village rector, in his capacity as corporation sole, to title by adverse possession to a small piece of land used as an addition to the garden of the glebe cottages. The rector and his predecessors had had an oral tenancy of the land at a rent of ten shillings a year but no rent had been claimed or paid since 1940, the reason being that the landlords were staunch churchgoers and did not want to ask the church for money. The rector had arranged, though not formally contracted,

[13] *Boone* v. *Eyre* (1777) 1 H.Bl. 278; *Hongkong Fir Shipping Co. Ltd.* v. *Kawasaki Kisen Kaisha Ltd.* [1962] 2 Q.B. 26 at pp. 67–68, *per* Diplock L.J.; *Trans Trust S.P.R.L.* v. *Danubian Trading Co. Ltd.* [1952] 2 Q.B. 297 at p. 304, *per* Denning L.J.

[14] Such failure is not necessarily a breach at common law: see, *e.g.*, *Cutter* v. *Powell* (1795) 6 Term Rep. 320.

[1] [1967] 3 W.L.R. 1068; [1967] 3 All E.R. 122.

to sell the cottages, garden and the disputed piece of land to a motor-coach proprietor, tenant of the glebe cottages, whose activities in covering the ground with red shale and erecting a Nissen hut on it caused the plaintiff landlords to sue for possession of the piece of land. The rector defended by claiming that, as more than twelve years had elapsed since the last payment of rent, the plaintiffs had lost their title as a result of section 9 (2) of the Limitation Act 1939, which provides that a non-written periodic tenancy is deemed to expire at the end of its first period and that the landlord's right of action to sue his tenant for possession shall be deemed to accrue then or on any later payment of rent.[2] Section 10 of the 1939 Act enacts that a right of action to recover land shall not be deemed to accrue unless the land is in " adverse possession."

Prima facie, there would seem to be no answer to this defence and, indeed, Davies and Russell L.JJ. held that the defence succeeded, the rector's claim to a squatter's title being established. Lord Denning M.R. dissented, principally on the ground that the tenancy had been granted to each rector personally and not to the corporation sole, with the result that the present rector's five years was not long enough to bar the landlords, the rector being unable to add previous periods of possession by his predecessors since there had been vacancies in the living.[3] This ingenious argument seemed, with great respect to the learned Master of the Rolls, to be a non-starter on the facts of the case, as Russell L.J. convincingly demonstrated.[4]

All three Lords Justices, however, were critical of the claim to adverse possession, Lord Denning saying: " All I would say is that, if the law does penalise good nature in this way, the sooner it is changed the better " [5]; while Russell L.J. spoke of " the generous indulgence of the plaintiffs and their predecessors in title, loyal churchmen all, having resulted in a free accretion at their expense to the lands of the church." [6]

It is not the province of this note to pass moral judgment on the facts of this particular case, but, looked at as an abstract problem, are there not good social reasons for retaining the concept of acquisition of title by adverse possession? It is worth remembering that the Law Reform Committee who, by a small majority, recommended in 1966 the abolition of acquisition of easements by prescription, nevertheless were unanimous in wishing to retain acquisition of title by adverse possession.[7] Ninety years ago, Vice-Chancellor Bacon nicely balanced the pros and cons when he said:

[2] Within the 12 years from the deemed determination: *Sanders* v. *Sanders* (1881) 19 Ch.D. 373; *Nicholson* v. *England* [1926] 2 K.B. 93.
[3] See Limitation Act 1939, s. 10 (1) and (2).
[4] [1966] 3 W.L.R. 1068 at pp. 1074–1075 and 1080.
[5] *Ibid.* at p. 1077.
[6] *Ibid.* at p. 1080.
[7] Law Reform Committee, 14th Report, Cmnd. 3100, pp. 12–13. *Cf.* Report of Criminal Law Revision Committee on Theft and Related Offences, 8th Report (1966) Cmnd. 2977, paras. 42 and 43, dealing with " theft " of land.

> "There may, indeed, be cases in which that protection which the statute extends is hardly reconcilable with strict morality. Nevertheless, the law is established upon principles of the soundest public policy, to which, for the common good, private rights and interests must in all cases yield; and it is unquestionably the policy of the law that it is better in all cases that rights, the assertion of which has been neglected for a long period of years, should be disregarded, than that a course of transactions honestly conducted should be set at nought by permitting a captious chicanery to prevail against the good faith with which they have been conducted." [8]

It is to be hoped, therefore, that the criticisms of the Court of Appeal will not lead to pressure for complete abolition of the concept of title by adverse possession, which fulfils a valuable social function. It may be, however, that the concept of adverse possession requires further definition so as to prevent time running where there is ignorance by a landowner of the facts (or law?) causing him to lose his title to a squatter. A start has been made in this direction in personal injury cases by the Limitation Act 1963, which is, however, confined to ignorance of "material facts of a decisive nature." [9] Moreover, the provisions of the 1939 Act on "concealed fraud," as widely interpreted,[10] may prove a more potent weapon against the squatter than perhaps originally realised. Nevertheless, the majority of the Court of Appeal in *Hayward* v. *Chaloner* [11] were right in rejecting for various reasons any further extension of the dubious decision in *Williams Brothers Direct Supply Ltd.* v. *Raftery* [12] ("digging for victory" not inconsistent with owner's plans to develop as future building plot—therefore digger not adverse possessor), which could only erode still further that certainty which should be of the essence of title, squatter's or otherwise, to land.

MICHAEL GOODMAN.

WITCHCRAFT AND BIGAMY

THE defence of duress is so rarely encountered in criminal law that *Salaca* v. *The Queen*,[1] a recent decision of the Court of Appeal in New Zealand, may be of interest.

The appellant, a Fijian, was unsuccessful in his appeal against conviction by the Supreme Court on a charge of bigamy. In the words of Turner J., "all the facts necessary to support a conviction were incontestably proved and, indeed, were not disputed by counsel for [the] appellant." [2] The only defence pleaded was

[8] *Yardley* v. *Holland* (1875) L.R. 20 Eq. 428 at p. 442.
[9] See 1963 Act, s. 1, and *Re Clark* v. *Forbes Stuart* [1964] 1 W.L.R. 886.
[10] See Limitation Act 1939, s. 26, *Rains* v. *Buxton* (1880) 14 Ch.D. 537 and *Clark* v. *Woor* [1965] 1 W.L.R. 650.
[11] *Supra.* [12] [1958] 1 Q.B. 159 (C.A.).
[1] [1967] N.Z.L.R. 421. [2] *Ibid.* at p. 421.

duress and the basis of this defence was the appellant's contention that Kasanita, the woman whom he had married bigamously, had threatened to enlist the assistance of a witch-doctor " to do something to him " [3] if he did not marry her. The appellant was, apparently, unable to describe precisely what he feared that the witch-doctor might do, the most he could say being that " I was frightened that something might happen to me." [4] Two other Fijians, Kewa and Bula, gave evidence for the defence and they testified in somewhat vague terms to the power of " the baddies " to kill by supernatural powers which they (the witnesses) could not explain.[5] This was the full extent of the evidence upon which the defence of duress was based. The trial judge (McGregor J.) directed the jury to disregard the evidence of these two witnesses but nevertheless allowed the jury to consider the defence of duress. It was rejected.

The common law defence of duress has been codified under the name of compulsion, in section 24 of the Crimes Act 1961. So far as relevant, this section enacts as follows:

> " (1) . . . a person who commits an offence under compulsion by threats of immediate death or grievous bodily harm from a person who is present when the offence is committed is protected from criminal responsibility if he believes that the threats will be carried out. . . ."

Subsection (2) contains a list of offences to which duress can never constitute a defence; bigamy is not one of them. These provisions avoid much of the uncertainty of the common law with regard to the nature of the defence of duress and the offences to which it is applicable. They provided a clear answer in the present case. There must, if the defence is to be successful, be " *compulsion by threats of immediate death or grievous bodily harm from a person who is present when the offence is committed.*" [6] Kasanita, the person from whom the threats emanated, was of course present when the crime was committed. However, the appellant testified, her threat to enlist the assistance of a witch-doctor was uttered some time before the bigamous marriage was contracted. The lapse of time (the report does not state how long it was) was fatal to the appellant's defence. Moreover, the Court of Appeal seems to have considered that the threats inherent in the practice of witchcraft were too vague and unsubstantial to be capable of being regarded as " compulsion by threats of immediate death or grievous bodily harm." The trial judge would, therefore, have been justified in withdrawing the defence of duress from the jury. His direction was over-indulgent to the appellant whose appeal was dismissed.

The issue was so simple and clear-cut that Turner J., who

[3] *Ibid.* at p. 421.
[4] *Ibid.* at p. 421.
[5] *Ibid.* at p. 422.
[6] s. 24 (1), Crimes Act 1961 (italics added).

delivered judgment on behalf of the whole court, found it unnecessary to refer to the position at common law. He ignored the tempting similarity between the present case and *Burton* v. *State of Texas* [7] in which a threat to lynch the accused the day before his bigamous marriage was not regarded as a threat of immediate death. There was no need to consider *Attorney-General* v. *Whelan* [8] which recognised duress in the sense of threats of death or serious personal violence as a defence to a charge of receiving stolen property. Nor was there any reference to the recent decision of the Court of Criminal Appeal in *R.* v. *Gill*.[9]

It is unfortunate that *R.* v. *Gill* was not mentioned because, it is submitted, the Court of Appeal in New Zealand has now in effect joined the English Court of Criminal Appeal in recognising as correct Professor Glanville Williams's view of the evidentiary issues raised by the defence of duress.[10] In observing that the trial judge would have been justified in withdrawing the defence of duress from the jury, Turner J. pointed out that " it must be reasonably raised by evidence before it can be availed of by an accused." [11] He apparently approved of the formula adopted by the trial judge in directing the jury that they should acquit the appellant " if they were in any doubt about the matter." [12] In other words, the accused who pleads duress as a defence to a criminal charge undertakes an evidential burden, but, the defence of duress having been raised in substance, the Crown bears the persuasive burden of destroying it. This is surely correct and it may be assumed that the Court of Appeal in New Zealand has not merely endorsed the views of Professor Glanville Williams but has also, albeit fortuitously, preferred the direction of Oliver J. in *R.* v. *Purdy* [13] to the views expressed *obiter* by Lord Goddard C.J. in *R.* v. *Steane*.[14]

When directing the jury in the present case, the trial judge emphasised that it is the state of mind of the accused himself with which a court is concerned whenever the defence of duress is in issue.[15] He therefore told the jury that it should ignore the evidence of Kewa and Bula, saying that what Fijians in general think about witchcraft and its effects was irrelevant. In the opinion of the Court of Appeal this was a misdirection. The evidence of these two witnesses, vague and indefinite though it was, would have served to explain the state of mind of the appellant; it was therefore admissible. However, since the defence of duress should not have been left to the jury at all, it followed that in spite of this misdirection the appellant had been treated over-generously and the court was not persuaded on that account to allow the appeal.

[7] 51 Tex.Cr.R. 196, 101 S.W. 226 (1907).
[8] [1934] I.R. 518.
[9] 47 Cr.App.R. 166; [1963] 1 W.L.R. 841; [1963] 2 All E.R. 688.
[10] For Professor Glanville Williams's views see *Criminal Law* (2nd ed.), p. 762.
[11] [1967] N.Z.L.R. 421 at p. 422.
[12] *Ibid.* at p. 422.
[13] (1946) 10 J.C.L. 182 at p. 186.
[14] [1947] K.B. 997 at p. 1005; [1947] 1 All E.R. 813 at p. 817.
[15] [1967] N.Z.L.R. 421 at p. 422.

This case illustrates the narrow limits within which the defence of duress is allowed to operate by New Zealand's Crimes Act. In his *History of the Criminal Law* Stephen considered that the only place for duress was by way of mitigation of punishment. Nevertheless the Draft Code of 1879, in the preparation of which Stephen played a considerable part, accorded limited recognition to duress as a defence. The Draft Code is of course the precursor of the present Crimes Act in New Zealand and it is significant that section 24 excludes duress as a defence from a wide range of serious crimes.[16] What this case makes clear is that even in those instances where duress may provide an effective defence, its scope is very restricted. It will not avail an accused unless it is being exerted and operating on his mind at the time when the offence is being committed. Moreover, only "threats of immediate death or grievous bodily injury" will suffice. In a country the inhabitants of which include primitive people still dogged by superstition and belief in the powers of magic one wonders if this is altogether realistic. To such people the threat of witchcraft carrying the power to kill by supernatural powers which the victims cannot explain or understand may well amount to a continuing menace at least as potent as "threats of immediate death or grievous bodily injury from a person present when the offence is committed."

R. A. CALDWELL.

DELEGATION AND THE RULES OF NATURAL JUSTICE

THE New Zealand Dairy Production and Marketing Board has the power to zone dairy farmers, who may then supply their milk and cream only to the dairy factory in their zone. The zoning arrangements in the Northern Wairoa River area were due to expire in May 1968 and the thirteen-man Board appointed a committee of three of its members "to investigate the question of supply between the two companies [in the area] and to report back to the board."[1] The committee was unsuccessful in its efforts to effect an amalgamation of the companies and announced that it would hold a public hearing on a zoning application which had been made in January by one of the companies. Following a two-day hearing, the committee made a short report, consisting of the interested parties' submissions and the committee's recommendations but not including even a summary of the evidence (which had been recorded by the Secretary to the Board and which was available to the full Board had it wished to peruse it). It was not suggested "that any material point advanced on behalf of any of the parties before the committee

[16] By virtue of s. 24 (2) duress is not a defence to, *inter alia*, treason, piracy, murder, attempt to murder, wounding with intent, robbery, arson, and aiding or abetting rape.

[1] *Jeffs* v. *New Zealand Dairy Production and Marketing Board* [1967] 2 W.L.R. 186 at p. 140 (J.C.).

was omitted from the summary." [2] The full Board accepted the committee's recommendations on the day it received them.

Some farmers and the dairy company which stood to lose from the zoning order challenged it, *inter alia*, on the ground that the Board had acted illegally in delegating the hearing, the sifting of evidence and the making of recommendations to a committee, and in not considering all the evidence and submissions—it should not have relied simply on the report of the committee. The New Zealand Supreme Court and, by a majority, the Court of Appeal rejected the argument. The Privy Council reversed the decision.[3]

The parties accepted that the Dairy Board was obliged to act judicially [4] and the argument and judgments are strewn with references to " natural justice "; but the question may be asked whether this emphasis was necessary. First, there is the conundrum that the Privy Council held that, while the Board *could* delegate to the committee its *judicial* function of hearing and recording the evidence, it could *not* delegate to the committee the *administrative* function of making the decision. Here we have a neat reversal of the Denning dictum [5] that, while an administrative function can often be delegated, a judicial function cannot. Secondly although the question, in accordance with natural justice ideas, was usually stated thus—were the parties " given an adequate opportunity to present their case to the deciding body, namely, to the board "? [6]—it could also be put in these terms—had the Board really made the zoning order? [7] (All agreed that the Board itself had to decide.) Given the facts of the case—the committee's conduct of the hearing was not criticised—these two questions seem to raise precisely the same issues. If so, discussions of natural justice become irrelevant.

The Privy Council's judgment makes the following points:

1. The Board did not expressly authorise the committee to hold a public hearing on the zoning applications.[8]

The Board's authorisation—" to investigate the question of supply . . . and to report back "—was in wide terms and the accuracy of this proposition (which was not considered in the courts below

[2] McCarthy J. in the New Zealand Court of Appeal; [1966] N.Z.L.R. 78 at p. 99; see also p. 100 and McGregor J. at p. 105.

[3] [1965] N.Z.L.R. 522; [1966] N.Z.L.R. 78; [1967] 2 W.L.R. 186.

[4] *New Zealand Dairy Board* v. *Okita Co-operative Dairy Co. Ltd.* [1958] N.Z.L.R. 366 (C.A.). The Board reserved the right to challenge or to attempt to distinguish this case in the event of an appeal to the Privy Council, *e.g.*, [1965] N.Z.L.R. 522 at p. 525, but it did not avail itself of this right. The Judicial Committee accordingly missed the opportunity to rule on the conflict between *Nakkuda Ali* v. *Jayaratne* [1951] A.C. 66 (J.C.) and *Ridge* v. *Baldwin* [1964] A.C. 40.

[5] *Barnard* v. *National Dock Labour Board* [1953] 2 Q.B. 18 at p. 40 (C.A.).

[6] North P.: [1966] N.Z.L.R. 78 at p. 86.

[7] *Cf.* McCarthy J., *ibid.* at p. 99.

[8] [1967] 2 W.L.R. 186 at p. 144. *Cf.* Hardie Boys J.: [1965] N.Z.L.R. 522 at pp. 525, 538.

may be doubted. In any event the Judicial Committee does not pursue this issue to its logical end: is it not suggesting that the committee hearing and recommendation were unauthorised and accordingly of no effect? It is difficult to see what other consequence the proposition could have and indeed the Privy Council does not suggest one, although, as will be seen, the proposition reappears at the end of the judgment.

2. " In the discharge of its duty to act judicially, it was the board's duty to ' hear ' interested parties. . . . [T]he board did not hear the persons interested orally nor did it see their written statements." [9]

Again the logical consequence would appear to be an immediate finding for the plaintiffs. But the Judicial Committee did not take this step,[10] left this argument in the air, and went on to consider the inconsistent argument that an adequate summary of the hearing would be sufficient.

3. (i) " In some circumstances it may suffice for the board to have before it and to consider an accurate summary of the relevant evidence and submissions if the summary adequately discloses the evidence and submissions. . . ." [11] But (ii) " [w]ithout knowledge of what evidence was in fact given, their Lordships cannot conclude that " the evidence was adequately summarised.[12] Indeed (iii) " [t]he committee's report did not state what the evidence was and the board reached its decision without consideration of and in ignorance of the evidence." [13] Finally (iv) because of changes in the legislation, " it is to be inferred that Parliament deliberately refrained from giving the board power with the consent of the Minister to delegate any of the powers or functions entrusted to it. . . ." [14]

At (i) the Judicial Committee is, of course, casting doubt on its previous point: that the Board must hear or read *all* the evidence. It might be countered that it does not say that a summary would be satisfactory, but the inference is there to be drawn, and the judgment does not appear to stand on any other separate ground. Point (ii) suggests two questions: first, why were not the Secretary's notes of the public hearing available to the courts so that a realistic assessment could be made of the adequacy of the summary? Secondly, is the onus on the defendants to establish the *validity* of the order and the adequacy of the report? What of the maxim

[9] *Ibid.*

[10] This reluctance—if such it be—is not surprising when one considers the weight of authority for the proposition that a judicial function *can* in some circumstances be delegated; see, *e.g.*, North P. and McCarthy J.: [1966] N.Z.L.R. 78 at pp. 88 and 96–98.

[11] [1966] 2 W.L.R. 136 at p. 146.

[12] *Ibid.* at p. 146

[13] *Ibid.* at p. 144.

[14] *Ibid.* at p. 145.

omnia praesumuntur rite esse acta? [15] There is the further fact that the parties accepted that no material point was omitted from the summary. Point (iii) raises even greater difficulties. The first half of the proposition is doubtless accurate, but to say that the Board acted "in ignorance of the evidence" is, with respect, to ignore the evidence. First, three members of the Board had sat on the committee, had heard all the evidence, had deliberated on it and had produced the report.[16] Secondly the problem in the Northern Wairoa River area had been before the Dairy Board for many years and its members were fully aware of the facts and of the various interests.[17] There may be a question whether the members should act on such knowledge, but they were scarcely ignorant. Thirdly, the facts, "the evidence," were of little consequence so far as some of the issues before the Dairy Board were concerned. The Judicial Committee scores the fact that the report's one-sentence affirmative recommendation on whether there should or should not be a milk zone does not mention the parties' evidence or submissions.[18] But, as was stressed by the Board and the judges below,[19] the Board's policy is that "the law of the jungle" is a thing of the past: it will almost invariably reject arguments that there should be no zoning. The Board's decision on this point was "a matter not of individuals but of general principles." [20] In making point (iv) the Privy Council, like the judges in the courts below,[21] pointed out that the previous legislation had allowed delegation, with the Minister's consent, of, *inter alia*, the Board's zoning powers. The new Act, it was said, allowed no such delegation. With respect, this argument appears to be *per incuriam*, for section 48 of the Act expressly permits delegation, with the consent of the Minister, of "any of [the Board's] duties or functions." [22] Moreover what is the relevance of the point? The Minister was never asked to consent.

4. In its concluding paragraphs the Privy Council telescoped the above arguments: "The committee was not appointed by the board, nor was it asked by the board to receive

[15] See also McGregor J.: [1966] N.Z.L.R. 78 at p. 111.
[16] The Privy Council mentions this in its narrative of the facts but does not recall it at the relevant point: [1967] 2 W.L.R. 186 at p. 140.
[17] Hardie Boys J.: [1965] N.Z.L.R. 522 at p. 541; McCarthy and McGregor JJ.: [1966] N.Z.L.R. 78 at pp. 99–100 and 110.
[18] [1967] 2 W.L.R. 186 at p. 145.
[19] *e.g.*, McGregor J.: [1966] N.Z.L.R. 78 at p. 110.
[20] *Ibid.* at p. 109. See also Hardie Boys J.: [1965] N.Z.L.R. 522 at pp. 526, 539. Note in this regard the distinction drawn by Lord Reid in *Ridge* v. *Baldwin* [1964] A.C. 40 at p. 72 between decisions which are primarily concerned with a particular individual and those which are more affected by policy. This point was taken and developed in an interesting way by McCarthy J.: [1966] N.Z.L.R. 78 at pp. 98–100.
[21] North P. and McCarthy J.: [1966] N.Z.L.R. 78 at pp. 88 and 95.
[22] The Dairy Production and Marketing Board Act 1961 (in issue in this case) effected the amalgamation of what previously were two separate boards concerned with regulation and marketing respectively. S. 48 was taken from the *marketing* statute, but on its face, it now applies to regulation as well.

evidence for transmission to it. The committee's report did not state what the evidence was and the board reached its decision without consideration of and in ignorance of the evidence.

5. " The Board thus failed to hear the interested parties as it was under an obligation to do in order to discharge its duty to act judicially. . . ." [23]

The validity of the conclusion is dependent on the various propositions which it incorporates and which are discussed above. The only point to be made here is that the propositions are independent of each other and cannot be used interdependently in an effort to sustain each other despite their several infirmities.

More serious than the seeming lack of logic in the Privy Council's judgment is its failure to state the rules which it is applying. It does not adopt an inflexible rule that a body which is obliged to act judicially must always *itself* hear or read all the evidence. Doubtless precise rules cannot be established [24]; doubtless each case will turn on its special facts. But the Privy Council does not indicate when another procedure can be used; nor does it lay down the standards that procedure must adhere to: in what circumstances is a summary of the evidence enough; what must the summary contain; may findings as to the facts and recommendations as to the appropriate decision be included; how should the full authority deal with its delegate's summary and recommendations? Thus what procedure must be followed if a university disciplinary authority uses a committee to investigate the facts and make recommendations to it? [25] Or if a local authority uses a committee to investigate and recommend on town planning matters? [26] Or if a minister uses his department to enable him to dispose of an appeal? [27] Or if a police promotion board asks one of its members to investigate the ability of police officers? [28] Or to turn back to the facts of this case, to what extent do the following factors bear on a determination of the adequacy of the hearing: the great experience and ability of the members, their knowledge of the particular case, the high policy element in the decision, the concern that the efficiency of the Board which is primarily an administrative body burdened with extensive obligations and pressure should not be seriously impeded? These factors (which were discussed in the Court of Appeal [29]) may not establish that the procedure was

[23] [1966] 2 W.L.R. 186 at p. 146.
[24] See, *e.g.*, McCarthy and McGregor JJ. [1966] N.Z.L.R. 78 at pp. 95–96, 110 and *Russell* v. *Duke of Norfolk* [1949] 1 All E.R. 109 at p. 118 (C.A.).
[25] See *University of Ceylon* v. *Fernando* [1960] 1 W.L.R. 223 (J.C.).
[26] *Cf. Osgood* v. *Nelson* (1872) L.R. 5 H.L. 636.
[27] *Cf. Local Government Board* v. *Arlidge* [1915] A.C. 120.
[28] *Cf. Devlin* v. *Barnett* [1958] N.Z.L.R. 828.
[29] See especially the judgment of McCarthy J.: [1966] N.Z.L.R. 78 at p. 90, which, with respect, is a refreshing, if not always successful, attempt to get away from the superficial conceptualism which has often bedevilled administrative law in recent years. See also North P. at pp. 87–88.

adequate, but they surely should have been considered by the Privy Council.

The preceding discussion does not necessarily lead to the conclusion that the Privy Council, in the writer's opinion, reached the wrong decision; indeed, as the dissent of North P. in the Court of Appeal shows, there is much to be said for the decision. But, with respect, these conclusions do follow: first, the Privy Council has not indicated with any clarity or precision what rule or rules it is applying; secondly, it has not really analysed the difficult issues raised by the case; and, thirdly, it has not met the points made by the majority of the New Zealand Court of Appeal, which both judicial courtesy and judicial method surely demand.

K. J. KEITH.

MENTAL SHOCK AND THE AFTERMATH OF A TRAIN DISASTER

IN *Chadwick* v. *B.T.C.*[1] the plaintiff claimed damages in respect of the mental shock and subsequent financial loss suffered by her late husband, *C.*, as a result of his experiences during voluntary participation in rescue operations at the scene of the Lewisham train disaster.[2] The defendants, whilst admitting liability to those who had suffered death or physical injury through the impact of the crash,[3] contested the present claim on two main grounds.[4] The first was that in all the circumstances of the case there was no duty of care to guard against the particular species of injury inflicted upon *C.* The second was based upon a plea of *volenti non fit injuria.* Waller J. held both submissions to be unsuccessful and in the result damages of some £1,580 were awarded. There will be no appeal against the judgment.

In view of decisions like *Ward* v. *T. E. Hopkins & Son Ltd.*[5] and *Wagner* v. *International Ry.*[6] the conclusion on the *volenti* issue was entirely predictable and does not warrant further comment. The conclusions on the other aspects of the duty issue were, however, somewhat more surprising and envisage a considerable extension in the scope of liability for physical or organic injuries which stem from disturbances of a purely emotional character. The first point to note is that *C.*'s mental shock appears to have been caused not so much by fear for anyone's safety, but, rather, by his

[1] [1967] 2 All E.R. 945.

[2] The action was commenced by the husband and continued after his death by his widow claiming under the Law Reform (Miscellaneous Provisions) Act 1934. The cause of death was in no way connected with the incident which formed the basis of the present claim.

[3] A sum in excess of £800,000 was in fact paid as compensation to injured passengers and the dependants of those who died in the crash.

[4] The defendants also submitted, *inter alia*, that there was insufficient proof of a causal connection between C.'s experiences at the scene of the disaster and the subsequent mental shock.

[5] [1959] 3 All E.R. 225.

[6] 232 N.Y.Rep. 176 (1921). Both decisions were cited by Waller J.

observing the gruesome aftermath of a disaster and, in particular, the dead body of a small child to whom he was completely unrelated.[7] Although the argument was not advanced by the defendants it has nevertheless been suggested elsewhere [8] that there is simply no duty of care to guard against the infliction of mental shock through the emotion of grief as distinct from fear. The purported distinction is admittedly as arbitrary as it is tenuous, but it does appear to have the support of several Commonwealth authorities [9] which were not cited in the present case. Moreover the only English cases allowing recovery for shock sustained through grief are based upon a process of reasoning which is now commonly accepted as being erroneous.[10] Apart from this point it would also be true to say that the awarding of damages for shock stemming from anxiety over the well-being of a total stranger is, in itself, a new development. Hitherto the vast majority of successful claims have involved some form of family relationship between the person suffering shock and the person negligently placed in a position of danger.[11] Indeed the defendants submitted that as a matter of law recovery was only possible where the shock emanates from fear for one's own safety or for the safety of one's children. Waller J. held that such a conclusion was neither dictated by authority nor desirable in principle.[12]

Whilst the decision allowing recovery on the facts of the case is, perhaps, sound, the actual reasoning adopted to justify it is certainly open to criticism. In the relevant part of his judgment his Lordship said [13]: "I am inclined to think in this case that if the defendants had thought about it, they ought to have foreseen the possibility of a rescuer suffering from shock, but *in my view it is sufficient to say that shock was foreseeable and that rescue was foreseeable.*" The italicised part of the above passage requires further amplification since it contains the ground upon which the decision was ultimately based and what appears, with respect, to be a fundamental error of reasoning. Waller J. appears to be arguing that since the defendants ought to have foreseen both the presence of a rescuer who might be physically injured and the infliction of mental shock upon someone (*semble*, a passenger), they were *therefore* liable to

[7] *Cf.* [1967] 2 All E.R. 945 at p. 948.

[8] See, *e.g.*, Fleming, *The Law of Torts* (3rd ed.) at p. 161; Street, *The Law of Torts* (3rd ed.) at p. 114.

[9] *Cf. Gray* v. *Sun Publishing Co.* [1958] 4 D.L.R. 577; *Chester* v. *Waverley Corporation* (1939) 62 C.L.R. 1; *Finbow* v. *Domino* (1957) 11 D.L.R. (2d) 498.

[10] See *Owens* v. *Liverpool Corporation* [1939] 1 K.B. 394 (criticised by Fleming, *op. cit.* at p. 158); *Schneider* v. *Hisovitch* [1960] 1 All E.R. 169 (criticised by Street, *op. cit.* at p. 148).

[11] *Cf. Boardman* v. *Sanderson* [1964] 1 W.L.R. 1317; *Hambrook* v. *Stokes* [1925] 1 K.B. 141. See also *King* v. *Phillips* [1953] 1 Q.B. 429.

[12] Some support for his Lordship's view is to be found in *Dooley* v. *Cammell Laird & Co. Ltd.* [1951] 1 Lloyd's Rep. 271, where the operator of a defective crane recovered damages for shock caused by fear for the safety of a fellow employee. The case was not, however, cited in the judgment.

[13] [1967] 2 All E.R. 945 at p. 952.

the rescuer, *C.*, irrespective of whether or not they ought to have foreseen that a rescuer might suffer mental shock.[14] This reasoning was supported by a reference to *Hughes* v. *Lord Advocate* [15] which was cited as authority for the proposition that where the broad category of risk is foreseeable it is irrelevant that the precise steps by which the risk materialises are unforeseeable.

His Lordship's conclusion does not, with respect, follow from the premises since *Hughes* v. *Lord Advocate* does not dispense with the need to establish objective foresight of the broad category of risk run by the plaintiff or by a class of persons of which the plaintiff forms a part. The decision does not enable a plaintiff to build upon the real or hypothetical breach of a duty of care which was owed to someone else. In short a minimum prerequisite of liability in the present case was a clear decision to the effect that the infliction of mental shock upon a rescuer ought reasonably to have been foreseen. As was indicated above Waller J. inclined to the view that this was foreseeable, but preferred to base his decision on other grounds.

Although his Lordship's view on this particular issue was to some extent supported by medical evidence,[16] it is not, of course, the only possible one. Thus it may be contrasted with, for example, the views expressed by the High Court of Australia in the leading case of *Chester* v. *Waverley Corporation*.[17] In the course of his judgment dismissing the claim of a mother who had suffered mental shock through observing the removal of the dead body of her daughter from an inadequately guarded street excavation, Latham C.J. said [18]: "It is, however, *not* a common experience of mankind that the spectacle, even of the sudden and distressing death of a child, produces any consequences of more than a temporary nature in the case of bystanders, or even of close relatives who see the body after death has taken place." [19] The contrast between the respective opinions of Waller J. and Latham C.J. only serves to indicate that the solution to the question of what ought to have been foreseen cannot be determined by logic alone.[20] In the context of *Chadwick* v. *B.T.C.* the solution depends, rather, upon whether the risk of a rescuer suffering mental shock is a risk that can properly be regarded as incidental to the activities of railway authorities, or, for that matter, of coach, ship or airline operators. Since clear evidence of physical or organic injury is always required there is a great deal to be said for an affirmative answer.

C. J. Miller.

[14] *Cf. ibid.* at pp. 951–952.
[15] [1963] A.C. 837.
[16] *Cf.* [1967] 2 All E.R. 945 at p. 949.
[17] (1939) 62 C.L.R. 1.
[18] Ibid. at p. 10.
[19] *Cf.* Havard, "Reasonable Foresight of Nervous Shock" (1956) 19 M.L.R. 478; H. W. Smith, 30 Va.L.Rev. 198 at pp. 225–226 esp.; 64 A.L.R. 2d 100 at p. 105.
[20] *Cf. Waube* v. *Warrington*, 258 N.W. 497, 98 A.L.R. 394 (1935).

REVIEWS

JURISPRUDENCE. By B. A. WORTLEY, O.B.E., LL.M. (Leeds), LL.D. (Manchester), Professor of Jurisprudence and International Law in the University of Manchester. [Manchester University Press and New York: Oceana Publications Inc. 1967. 478 and xxi pp. 68s.]

ALTHOUGH this eagerly awaited book bears the stark title *Jurisprudence*, it is no ordinary textbook in the field of study known in the common law world by that name, but rather the personal testament of Professor Wortley, who has been a distinguished Professor of Jurisprudence and International Law for more than twenty years. It is all the more refreshing on that account, for it is the antithesis of the no-value-judgment trend prevalent in contemporary juristic thought. We are told that much of the text is derived from articles published in numerous journals, English and foreign, over the last thirty-five years. Every now and then we seem also to detect the more personal note of the lecturer. The choice of topics, and the emphasis put on them, reflect the learned author's special interests in International Law and the unification of appropriate branches of municipal systems.

The introductory chapter is an incisive attack on anarchism as the negation of law, based on an article published in 1947 and apparently stimulated by recurrent manifestations of anarcho-syndicalism in industrial disputes. Against this is set the idea of law as prediction. To exaggerate the elements of order, rule and prediction in law might be taken by itself to be a symptom of advancing age, but the balance is restored in the latter part of the book by insistence on values, especially justice. Incidentally in the very first sentence—"It has been said that the law consists of expatiating on the obvious and explaining the self-evident"—surely "Jurisprudence" should be read for "Law."

Part 2, "Sources of Legal Rules," lists the more important material sources of law according to Pound, and then sketches the main kinds of legal orders today, with a tribute to Wigmore. A reference to Vinogradoff's *Historical Jurisprudence* might have been made here, but perhaps that work was thought to be out of date. Part 8, "Types of Legal Rules," discusses what are more generally called the sources of law. We did not find the chapter on Custom very clear—what book is?—on the question of general custom in English law. It is said that general custom must be immemorial, but then it is said that constitutional custom (mainly the manner in which Parliament legislates) is not necessarily immemorial. The only general non-mercantile custom instanced is primogeniture before 1926, but this had long been incorporated into the body of case law and statute law. No doubt custom was the source of the law of primogeniture centuries ago, but in what sense was primogeniture still custom in 1925? Perhaps we should use the word "custom" for the source or law-creating agency, and "customary law" for the product. The chapter on Judicial Precedent ("The Custom of the Courts") contains useful short comparisons with Roman law, French law and the United States Supreme Court. The discussion of precedent in the House of Lords is, of course, modified by Lord Gardiner's practice statement of July 1966, which is given in an Appendix. Less attention is paid to the problem of finding the *ratio decidendi*, it being suggested that this question can usually be settled by looking at the pleadings.

An account of the law-making procedure of Parliament is followed by a

chapter criticising Austin's theory of sovereignty. One weakness of Austin's command theory is shown to be the subjective nature of "pain" or "evil." Professor Wortley regards States as being limited by International Law. So by International Law they are, but is this doctrine accepted by English law as limiting the powers of Parliament? If so, how and when did this acceptance take place? With regard to English law, the statement (p. 180) that the sovereign incurs liability under the Crown Proceedings Act 1947 is not true if the sovereign is Parliament—this is a confusion between two different meanings of "sovereign."

An unusually large proportion of the book is devoted to topics falling broadly under the heading of International Law; indeed, two parts, "Types of Legal Orders" and "Fundamental Values and their Protection by Law: Human Rights," take up nearly half the book. The supremacy of International Law may come—probably must come—eventually, but that can only be when it is recognised by municipal legal systems, which between them created modern International Law. The process is something like the reverse of the changed relation between Parliament and the independent members of the Commonwealth. That supremacy cannot be demonstrated by referring to International Law itself, nor do I think that the Nuremburg trials can be relied on as an authority for this doctrine. It is probably my fault—having been brought up on those anarchists, Hall and Lawrence (*cf.* p. 22)—that I am not convinced by the eloquent historical argument on "International Law as a Basis of World Order" (Chap. 8). Our courts do not even recognise treaties as a source of English law. Lord Gardiner has expressed the same opinion in the House of Lords as his predecessor, Lord Kilmuir, that if Britain joins the European Economic Community the legal consequences will derive their validity from an Act of Parliament, which cannot bind itself for the future. The section in Chapter 9, "Devices to prevent clashes between Legal Orders", shows how far there is to go before the supremacy of International Law over States is anything like the supremacy of Parliament and the courts over local authorities. The tardy acceptance by the United Kingdom of the jurisdiction of the European Court of Human Rights (Chap. 15) was not only voluntary but also temporary.

Professor Wortley has many valuable things to say which cannot be enumerated in a review. It is interesting to see such prominence given to Sir Thomas Erskine Holland, who—like Professor Wortley—was equally eminent in Jurisprudence and in International Law. Holland's *Jurisprudence* was the staple fare in my undergraduate days, though Brierly's description of it forty years ago as "the most successful book on Jurisprudence ever written" must sound strange to the modern reader. Professor Wortley's chapters on Human Rights deserve to be, and will be, widely read, and it is fitting that they should form a prominent feature of this book. Many law teachers, as well as students, will share the learned author's enthusiasm for the subject. My own private view is that the battle has been largely won, and that the time has now come when more attention should be paid to duties. A world in which everyone insisted on his rights, but paid little regard to his duties, would not be a very pleasant place to live in. The moral is pointed by the opening chapters on order and rules and the concluding chapters on Justice. The moral might also have been pointed by reference to Hohfeld's analysis of legal relations, but the discussion of this is scarcely helped by the "short sally into the field of Aristotelian logic."

The best part of the book in my opinion is the last part on Justice and Equity. Here a good deal is owed, understandably, to Aristotle and Aquinas, but we do not depreciate the merits of Klemperer if we distribute some of our praise to Beethoven. Here is the clearest and soundest interpretation we know of Aristotle's theory of justice and its application to modern society. Professor Wortley, for the benefit of those who are not privileged to know him, identifies himself with the idealist school, and quotes Lord

Devlin as saying that "no society has yet solved the problem of how to teach morality without religion." Some queries on minor points present themselves. In the section on "Objects of Punishment" is not too much reliance placed on material that is thirty years old? In the section on "Superior Orders" would not the student expect some discussion of crimes in municipal law, such as murder, as well as war crimes? Is the liability of a soldier necessarily the same in both cases? If in relation to Nazi laws Lon Fuller suggested in the *Harvard Law Review* (1958) that "retroactive legislation is useful here"—which sounds more like Hart's view—is this consistent with Fuller's considered view expressed in *The Morality of Law* (1964)?

To return to the book as a whole, Professor Wortley has given us an original, learned and unusual book, which is more likely to provide a stimulus to law teachers and advanced students for thinking along unaccustomed lines than a manual for undergraduates.

O. HOOD PHILLIPS.

THE AMERICAN JURY. By HARRY KALVEN JR. and HANS ZEISEL. [Boston: Little, Brown & Co. 1966. x and 559 pp. (including index). £5 10s. net.]

THIS book should mark the start of a new era in legal research, and in legal publication. It provides a brilliant foretaste of the law book of the immediate future, setting new standards of thoroughness of preparation, diligence of execution, and clarity of exposition. It adds more to the understanding of its subject-matter than a whole library of the woolly amalgams of individual speculation, private recollection and personal prejudice which have hitherto passed for the sociology of law. Its scope is however a little more limited than its title might lead one to expect, since it only deals with one facet of the criminal jury in the United States. Another comparable volume will deal in the same way with civil juries, and others will deal in greater depth with more particular issues. This book mentions merely incidentally the composition and selection of juries, their conditions of work, their methods and their efficiency. It is solely concerned to analyse disagreement between judge and jury, a concern pregnant with methodological advantage.

English readers, and more especially potential writers, will envy the authors their opportunities for compiling this book. They are beyond our wildest dreams, and likely to remain so in the present climate of icy judicial distaste. It is pathetic to compare the hundreds of pages of neatly marshalled facts about the American system with the one page impressionistic letter from the Lord Chief Justice purporting to express the British position. It is horrifying that major reforms are being introduced upon such a basis. The temptation for the English writer in such a situation is to argue from the American facts to the English solution. It must be resisted. Indeed one of the most interesting features of the book is the light it sheds upon the differences between jury trial in England and in the United States. Thus many of us have the crude general impression that jury trial is commoner there than here. Yet one learns that in Wisconsin over three-quarters of all criminal trials take place without juries, and in a further seven states the fraction is more than one-half. This is largely explained by the privilege of jury waiver granted to the defence. Such waiver is commonly exercised. Thus of the fifteen major crimes, in only one, murder, were juries waived in less than a quarter of the cases. A further crucial difference is that in only eleven states is the judge allowed the latitude for summary and commentary on the evidence that he has here, and in only two of those eleven is that latitude exercised more than half of the time. Then in many states the jury plays some part in determining sentence, and in most where the question of a death penalty arises. The law too is significantly different on such difficult jury issues as imputed intent and insanity. Two examples will

serve to dramatise the difference between jury trial in the United States and in the United Kingdom. Thus, in one case where a woman was accused of knifing her paramour, it appears that there was an all-female jury. And in another, the jury, after acquitting a man charged with the rape of his ten-year-old daughter, there having been two previous failures to agree, actually took a collection for the accused, and gave it to him afterwards.

This book must therefore be judged simply upon the basis of its achievement in what it set out to do, that is, to present a comprehensive and comprehensible account of the reasons for disagreement between judge and jury in criminal trials in the United States. As such it is a complete success. The method involved a large, effectively self-selected, sample of judges keeping a continuous check on cases tried before them. The sample was corrected and cross-checked in various ways, and although not perfect, all proper reservations are made in the conclusions drawn. In presenting their work, the authors combine both the explanations for disagreement given by individual judges in particular cases, and an overall statistical analysis. In this way scientific validity is combined with literary vitality. Most chapters begin with the individual explanations to justify the statistical categories, they then express the results in tabular form, and finally draw from them whatever conclusions can be justified. A minor complaint here is that the authors tend to re-express each table in inevitably turgid prose, presumably for the benefit of those congenitally unable to relate columns and rows of figures to their headings. The prose is in fact generally rather flat, but at least avoids the constipation of so much writing in this field. Punctuation is sometimes a little erratic, and thus the total elimination of commas in footnote 2 on page 484 might induce the unwary to believe that the Homicide Act 1957 retained capital punishment only for those shooting police officers in the course or furtherance of theft. It is perhaps a measure of the difference between our cultures that the authors find it necessary to explain their allusion to the maxim of Caesar's wife, but are content to leave a reference to the Jean Valjean complex without any further elucidation.

Conclusions are so far qualified that there is little scope left for disagreement. Time and again the question raised by an initial statement is immediately settled by a subsequent one. Two general, and one particular, doubts remain. It was felt that the authors did not allow sufficiently for the distorting effect of the presence of the jury upon the trial itself. Thus if a trial were really by judge alone, the judge might in fact decide it differently from the way in which he believes *after a jury trial* that he would have decided it, had he tried it alone. Secondly, the apologia for the extreme under-representation of cases from the South in the sample was not completely convincing. The particular, and not completely unconnected, point is a certain unease at the authors' failure to analyse the sample by reference to coloured victims despite several indications in the judges' explanations that this was the reason for disagreement, and although there was such an analysis of cases where the victim was a policeman. This failure may, as the authors recognise, have a seriously distorting effect on the very short section devoted to crime in the negro sub-culture as it is described.

The book is produced to the highest standards, and misprints seem to have been eliminated altogether. The only slip noticed was the insertion of North Dakota in the second column of Table 104 in the place of North Carolina.

COLIN TAPPER.

LAW RELATING TO NUCLEAR ENERGY. By HARRY STREET and F. R. FRAME. [London: Butterworths. 1966. 820 pp. (including index). Price £5 10s.]

THE importance of the development of nuclear energy to our society certainly needs no stressing, and it is all too clear that this development gives rise to

many legal issues of a novel and indeed unprecedented character. This new branch of the law, notwithstanding a whole series of important statutes, has been hitherto somewhat neglected by lawyers in this country. A new textbook in this field is therefore timely, and the present work is admirably adapted to meet the needs of both lawyer and administrator alike.

The book is extremely comprehensive, covering fully both the organisational aspects of the subject, and the many different forms of liability which may result from the use or exploitation of nuclear energy, whether in nuclear installations, nuclear ships, or by way of the use or transport of radioactive materials and whether liability arises from operations occurring in this country or abroad.

From the point of view of the legal practitioner, Chapter 4, dealing with civil liability arising under the Nuclear Installations Act 1965, is likely to constitute the central feature of the book. The Act is subjected to a full and detailed analytical exposition, and the authors do not refrain either from expressing their own opinions on doubtful questions of construction, or from making critical comments where necessary. For instance, the authors very rightly criticise the failure of the Act to face up to the problem of liability to those unborn at the time of the occurrence. Section 18 (6), which provides for reduction of compensation in the case of intentional or reckless conduct by the plaintiff, is also subjected to justifiable criticism.

The implications of an escape from a nuclear installation are so far-reaching that it is satisfactory that, as a result of the Brussels Convention, the matter is not now left merely to an insurance cover with a £5 million limit, but provision is also made for the possibility of claims being met out of public funds for which a sum of no less than £48 million has been set aside.

English lawyers will also study with particular interest the portion of the book discussing the general problems which may arise in the case of liability not governed by particular legislation. The well-known incident which occurred in Holland in 1958 is sufficient to draw attention to the importance of this possibility of residuary liability, and it is fairly obvious from the discussion of the authors that this aspect of the matter still stands in need of a good deal of careful appraisal. Having covered reasonably adequately most of the main types of liability which are likely to arise, there does seem a case for further legislation to cover the residuary cases, rather than leaving these to be dealt with by the general common law of negligence and dangerous things and activities.

The book also contains the full text of all the relevant statutes and conventions, though unfortunately without annotations or cross-references to the text, which would have proved of some assistance to the reader.

Altogether this new work may be warmly welcomed, and the claim of the publishers that it is obviously destined to become the standard work on the subject does not seem to be an overstatement.

DENNIS LLOYD.

SOURCES OF FAMILY LAW. By J. C. HALL, M.A., LL.B. Cambridge Legal Case Book Series. [London: Cambridge University Press. 1966. xxiii and 514 pp. 60s. (cloth); 30s. (paperback).]

THIS book is the third in the Cambridge Legal Case Book Series and follows hard on the heels of Professor Wilson's admirable *Cases and Materials on Constitutional and Administrative Law*. Unlike that wide-ranging collection the present work restricts itself to a more narrow segment of materials. On the other hand, it differs from Turner and Armitage's *Cases on Criminal Law*, which began the series, by being a sourcebook of statutes as well as cases. Thus, the back of the bookjacket accurately describes its contents as an analysis of selected cases and statutes in English family law. Why

then is it claimed on the jacket's flap to be "a comprehensive collection of cases, statutes and other materials"? One's excitement to see what these other materials are is damped when on looking into the book they emerge mainly as extracts from the (now dated) report of the Morton Commission and tables from the Criminal and Civil Judicial Statistics; the brief passages from other official reports and periodical articles amount to only eight or nine pages of text overall. Legal authors are ill served by publishers' puffs which arouse unfulfilled expectations. This consumer's grievance off his chest, the reviewer found the book a model of its kind, within the author's self-imposed limitations: the "sources" of family law to which the title refers are case and statute, and no better selection could be imagined than that made by the author.

Mr. Hall sees family law as embracing "certain parts of the general corpus of the law which have an especially close bearing on the family as such, either by postulating requirements for recognition of the union between its initial members or by determining rights and duties between those members and between them and their offspring, or by providing means for the family's artificial termination. All such rules may be described as family law." The plan of the book follows this helpful definition by beginning with marriage (Part I) and ending with divorce (Part IV), although this last part is somewhat strangely entitled "Dissolution"—surely not a term of art by itself? The middle two parts are concerned with the relationships of husband and wife, and parent and child, respectively.

The cases are skilfully edited and the very brief linking headings and comments are always helpful. The author has not hesitated to divide up the statutory material and intersperse the cases with the parts or sections of the Acts to which they relate. The reader is piloted adroitly through such difficult parts of the subject as the law of maintenance and property rights between spouses. Particularly successful is the arrangement of the material on parent and child where the mixture of public and private law usually presents special difficulties to both student and teacher.

The weakest aspect of the book is its reluctance to refer students to the periodical literature: such articles as receive a mention are only a tiny fraction of the doctrinal writing which has been lavished on this subject in the last decade or so, nor are they always the most significant. Certainly the reviewer expects his students to read more widely than does this book. It almost seems as if the author intended originally to include no references to doctrine. This would have been a consistent policy and in line with his avowed intention to provide only the "raw materials" and not a substitute for a textbook. But the rather random references which now appear could lull the unwary into the illusion that he need stray no further afield.

The book is beautifully printed and produced and very free of minor errors (but the cross-reference on page 18 is wrongly numbered, and the footnote on page 126 should refer to a matrimonial offence committed by the *wife*, not the husband, in discussing *Wabe* v. *Taylor*). It is however wrong to say (as is said on page 254) that the magistrates cannot resolve inter-parental disputes about children under their matrimonial jurisdiction unless a ground on which an order can be made exists: section 4 of the 1960 Act expressly contradicts this. One can, of course, only commiserate with the author that this book was published a few months too soon to permit any reference to *Putting Asunder* or the reports of our two Law Commissions in the short section on proposals for reform of the law of divorce. *Re C. (A.)* [1966] 1 W.L.R. 415 and *Re C. (M.A.)* [1966] 1 W.L.R. 646 ("the blood-tie case") were also presumably decided too late to get more than the briefest references.

The hardcover edition received for review is handsomely bound and not dear by today's prices. The paperback version is a bargain and would be a wise investment for every student of this rapidly evolving subject. The

bigger and much more extensive Webb and Bevan's *Source Book*, although well spoken of by students who have used it, has now unfortunately been overtaken by changes in the law, especially the reshuffling of the pack of enactments which make up the Matrimonial Causes Act 1965. *Hall* will sell well, deservedly.

L. NEVILLE BROWN.

SOVEREIGNTY WITHIN THE LAW. By ARTHUR LARSON, C. WILFRED JENKS and OTHERS. [Dobbs Ferry, New York: Oceana Publications Inc.; London: Stevens & Sons Ltd. 1965. x and 492 pp. (with index). £6 10s. net.]

THIS book is intended to be an intellectual sequel to *The Common Law of Mankind* by Dr. Jenks. The thesis is that international law has now reached a critical stage at which it needs to adapt quickly to the political fact that there is now a world-wide community of states and not a narrowly based state system related to Western dominance. Thus international law must broaden its intellectual foundations to fulfil the needs of a universal system. The purpose of the collective effort of Professor Larson and his collaborators is to examine the relation of law and sovereignty as a contribution to the problem of reaching a synthesis of ideas and basic rules of the various legal systems of the world. The emphasis is on the need to understand the relation between internal systems of law and political thought and attitudes applied in external relations.

The main body of the work consists of eighteen studies of types of law or national legal systems in relation to sovereignty and the rule of law. Quite apart from the broad theme of the volume as a whole and its general ambition, it must be said at once that a number of the contributions give useful and interesting information not readily available elsewhere. This is true, for example, of the contributions on the "personal laws," Jewish, Islamic and Hindu. However, certain of the contributions tend to be too short or banal to have much value except as "a part of the picture." A number of contributors are content to establish that the national system concerned has always had the rule of law and to say a little about the relation of national and international law and to leave the matter there. Thus the common law (*pace* Pound) had the rule of law as early as the fourteenth century and in Italy the principle of the rule of law can be traced back to Roman law (*pace* Cassese). The trouble with this type of approach is that, since the formal attributes of the rule of law are universally claimed (as this volume testifies), the formal requirements, though important as a sort of political "issue estoppel," leave a great deal to investigate. South Africa satisfies the formal requirements: and so have all the liberal democracies which had colonial empires in which racial discrimination, forced labour and slavery existed.

What one requires is an attempt to relate form and content. In the present volume the political aspects of the questions under debate are all too evident when it is discovered that the gap between aspiration and reality is only noticed in the case of Soviet, East European and Chinese law (as opposed to the law of Taiwan). Yet this gap is precisely what does require general analysis. Moreover, the nature of the aspiration accepted in the constitutional system is itself in need of adequate analysis. There is no reference in the volume to key questions such as racial discrimination, the availability of law to the masses, or the distorting and cancelling effect of internal and international power struggles on rule of law principles (contrast the Western reaction, or lack of it, to the 300,000 political murders in Indonesia in 1965–66 with the Russian wives issue in 1949). Racial integration in the United States cannot rest solely on legal machinery and must depend on political measures (the negro community, it seems, has now drawn

this moral). In many societies the infrastructure requires development before the rule of law becomes meaningful for peasants at subsistence level who do not know the code law of urban élites and are not literate in any case. The studies under review should have entered on some of these issues—more particularly if synthesis is aimed at and not a mere extension of "Western" or "European Communist" perspectives to other states. Only Alf Ross and Kōtarō Tanaka approach the relation of law and politics incisively. Of the volume as a whole it may be said that it is a valiant and ambitious effort to promote internationalism, much preferable to the usual *Pax Americana* tracts under the rule of law rubric, but unfortunately limited in its perspectives.

Ian Brownlie.

The New Nations in International Law and Diplomacy. Edited by William V. O'Brien. *Yearbook of World Polity*. Vol. III. [New York: Praeger. 1965. xi and 328 pp.]

Asian-African Legal Consultative Committee. Report of the Sixth Session, Cairo, 1964; Seventh Session, Baghdad, 1965. [New Delhi: Secretariat of the Committee. iii and 286 pp.; iii and 205 pp.]

The large increase in the number of new states since 1947, the change in balance in the membership of the United Nations and the adoption of the Resolutions on Ownership of the Natural Resources of States and on Colonialism, together with advocacy for the adoption of the legal principles underlying the friendly relations of states, have all drawn attention to the need to pay more than lip-service to the views of these newcomers to international society.

The third volume of the *Yearbook of World Polity* consists of four essays on independence and state succession (D. P. O'Connell); military servitudes and the new nations (Albert J. Esgain); United States recognition policy (W. V. O'Brien and U. H. Goebel)—this paper takes up 180 of the 158 pages of material and should be read with what appears in Whiteman's *Digest of International Law*; and the new states and the United Nations (J. E. S. Fawcett)—the Baghdad Session of the Asian-African Legal Consultative Committee apparently paid great attention to this problem, but no report of their discussion appears in the account of the Seventh Session held in 1965.

Dr. O'Connell points out that "concrete problems are to be solved much more by techniques of construction than by resort to abstract principles" (p. 40). This perhaps does not quite tally with his earlier comment that "once a problem arises and is solved, we have law willy-nilly, and when it is solved uniformly on a large number of occasions, we have a law that defies the efforts of the writers to negate it" (p. 9). Perhaps the link between the two statements lies in the reminder that "the law that was apposite for the solution of the problems of the nineteenth century is not necessarily cogent for those of the present" (*ibid.*).

Mr. Esgain's examination of military servitudes is spoiled somewhat by his Cold War overtones. He adopts a line which suggests that bases on behalf of the "East" are acquired by infiltration, while those enjoyed by the "West" result from agreement (p. 42). His bias comes out most clearly in footnote 2 of his paper, which is based on the *New York Times*: "The Russia that urged Indonesia to invade West New Guinea has introduced into Indonesia, which had become a 'virtual appendage of the Soviet bloc, even if an unwilling one,' great numbers of technicians and military personnel to instruct and train the Indonesian armed forces in the use of the military equipment and armament . . . with which Russia had provided Indonesia"

(pp. 259–260). Despite this bias, it would be interesting to know whether the majority of western lawyers agree that "treaties that accord to a dominant state any military use of servient territory during a war with a third state have as their purpose a breach of the law of neutrality—a purpose that, being contrary to generally recognised rules of international law—is not a valid treaty object. Such treaties are void *ab initio*, binding neither signatories nor third states. This illegality exists as well for so-called negative military servitudes that would preclude servient states from taking the action required of them by the law of neutrality and the UN Charter" (p. 96). There is no reference to *The Wimbledon*, acquiescence or the Austrian State Treaty.

The important thing that comes out of the survey of United States practice in the field of recognition is that this has now "become an ideological weapon . . . [and] a high degree of *subjectivity* has characterized much of modern United States recognition policy, in contrast to the tolerant objectivity enjoined by the original Jeffersonian theory of recognition" (p. 102). What is more, insistence on willingness to accept international law is "almost entirely confined to the practice of the United States" (p. 106), while, in so far as the new nations are concerned, "its subjectivity has resulted in the accordance of recognition to new entities that probably could not meet the traditional tests of statehood" (p. 207). According to Professor O'Brien and Dr. Goebel, American practice is so subjective that "a definition of 'sovereign state' drawn empirically from contemporary recognition practice would, if the U.S. experience is typical, be so broad that it might be necessary to give up the undertaking, and, instead, try to discover what kinds of entities are clearly *not* states and cannot become states. . . . The trend toward uncritical, instantaneous recognition encourages a relativism and nominalism in international law and relations that may prove as harmful in the realm of international relations as in that of law" (pp. 222, 223).

Mr. Fawcett warns of the dangers for international organisation inherent in the proliferation of tiny non-viable members, and produces some interesting figures (p. 243) to suggest that the new states are not nearly as cohesive as they like to suggest—the debates on the Middle Eastern crisis, however, may require this assessment to be revised, unless this is the exception which proves his point. He also draws attention to the interesting relationship between those supporting resolutions recommending financial assistance and those receiving it, a relationship which emphasises that financial contribution tends to be in reverse proportion to financial consumption (p. 246).

One might have hoped that the *Reports of the Asian-African Legal Consultative Committee* might have furnished the practical and local counterpart to the generalisations and comments of Westerners to be found in *World Polity*. Unfortunately, however, the *Reports* are not reports of discussion, but tend to be confined to brief summaries of what ensued at a particular conference accompanied by reproduction of adopted documents. Thus, while the conference at Cairo discussed dual nationality, the legality of nuclear tests, the rights of refugees, and Afro-Asian attitudes to the UN Charter, the volume is almost exclusively devoted to nuclear tests, although there is a draft convention on dual nationality. This latter is reminiscent of proposals made elsewhere and suggests that this group of new states is not so "reforming" in this field as it might be in others. The indication of large numbers of reservations makes the absence of a report on the discussion the more unfortunate.

In so far as nuclear testing is concerned, it is interesting to note the statement that "as sufficient evidence regarding the harmful effects of the underground test explosions of nuclear weapons is not at present available to the Committee, the Committee is unable at this stage to express any opinion on legality or otherwise of such test explosions." In so far as other tests are concerned, the view was that, in the light of their harmful

effects, these are illegal. If carried out over a state's own territory, such tests constituted an *abus de droit* and always involved absolute liability. The Committee also felt these tests to be contrary to the Universal Declaration of Human Rights and the Charter of the United Nations, although the reasoning behind this conclusion is not brought out.

The bulk of the Baghdad Report consists of an extremely lengthy exposition on the recognition and enforcement of foreign judgments, service of process and recording of evidence, both in civil and criminal cases. As in so many other instances, the Asian-African Legal Consultative Committee proves somewhat conservative, affirming the reasonableness and practicability of what has been accepted elsewhere. Although the conference gave detailed consideration to the Asian-African attitude to the Charter, there is no indication, either by way of discussion or document, to indicate what this viewpoint is. There is an interim report on refugees, which expresses the conventional view that "A State has a sovereign right to grant or refuse asylum to a refugee in its territory," although "a refugee shall have the right to return, if he so chooses, to the State of which he is a national and in this event it shall be the duty of such State to receive him."

In view of the constant assertions that one hears with regard to the alien imperialist character of traditional international law, the *Reports of the Asian-African Legal Consultative Committee* could serve a useful function if they gave full attention to the views of their members. To the extent that governmental comments are printed this is done, but too often extremely inadequate reporting is made of the views of the members of the Committee, especially in those matters where they themselves indicate that there is or may be an African-Asian viewpoint. It must also be borne in mind that the membership of the Committee is far smaller—and selective—than its grandiose title would suggest.

L. C. Green.

International Law in Australia. Edited by D. P. O'Connell. [London: Stevens. 1965. xliii and 608 pp. £5 10s.]

Professor O'Connell's *International Law in Australia* is different from the increasing number of publications dealing with international law "as interpreted and applied by" a particular state. Rather it is a collection of essays devoted to specific aspects of international law in which Australia has a special interest, or concerning which the writer feels that Australia has made some particular contribution. So much so that one wonders at times whether a little chauvinism has not crept in when assessing Australia's role at international conferences.

One of the most fascinating papers is the editor's opening contribution on the evolution of Australia's international personality. This is an interesting account of the development of status, much of which is of general application to the entire Commonwealth. Dr. O'Connell suggests that "the correct explanation of the present conflict of prerogative functions in the Commonwealth is that a personal union of several Crowns has taken the place of one indivisible Crown. . . . Should the United Kingdom become a Republic the Crown of Australia would remain unaffected legally, though it could hardly be expected to survive politically" (pp. 19, 22). His paper also contains a summary on treaty-making, and this should be read in conjunction with Mr. Body's more detailed account, based on his knowledge as Legal Adviser in the Department of External Affairs.

Another paper which is of more than parochial interest is Professor Sawer's analysis of Australian constitutional law in relation to international relations and international law, which raises a number of issues which concern any federal state. He points out that "no state [in Australia] has ever claimed an independent voice in matters of high international policy, such as defence, peace or war, and it is unlikely that any such claim would now be made"

(p. 88)—one cannot be nearly so sure about Quebec, at least in so far as relations with France are concerned. The federal issue has had its effect on International Labour Conventions, and the Australian ratification record remains poor (p. 47), with the Government sometimes using the federal difficulty "as an alibi for not committing the country to agreements when the Government dislikes the agreement on policy grounds but does not want to say so, whether for external or internal political reasons" (p. 47). Mr. Starke's survey of Australia's relations with the I.L.O. contains a useful table illustrating this poor record (p. 129), and makes similar criticisms (pp. 115, 128–129, 180, 181).

The Australian Ambassador to Belgium discusses Australia's UN commitments, but it is submitted reads too much into Article 2 (5) of the Charter (p. 68), and tends to endow too much authority to the resolutions of the General Assembly (p. 74). In his comments on domestic jurisdiction he mentions the Western criticisms of forced labour in the Soviet Union (p. 84), but does not refer to the Russian wives issue in which Australia played a notable part. One is tempted to ask whether this was because objectivity would have demanded some reference to Australia's contemporary refusal to allow the Japanese wives of Australian servicemen to enter the country.

The topic on which the United Nations might become increasingly concerned to Australia's embarrassment is her own colonialism, for, as Dr. Castles points out at the very beginning of his paper on Australia's overseas territories, she may well be "the last colonial power" (p. 292), a point which he again makes when reminding his fellow-Australians that their country was in the vanguard of the movement to bring non-self-governing territories within the ambit of the United Nations (p. 368), so that now she is merely reaping the harvest that she sowed in 1945 (p. 399). Dr. Castles' third paper deals with Antarctica, and states that despite the declaration of sovereignty made in 1936 affecting approximately one-half of that continent it is "difficult, if not impossible, to determine with any degree of certainty the territorial status of the Australian Antarctic Territory under international law" (p. 341). The Antarctic Treaty has "fixed" the situation for thirty years, and he hopes that this may be the prelude to complete internationalisation (p. 367).

In so far as general issues of international law are concerned, Professor O'Connell's comments on Australia's coastal jurisdiction are of interest. This problem has been examined by the Supreme Court of Canada and there are many who would agree with the editor that settlement of the competing claims as between the federal government and the states will be settled on the basis of policy (p. 249), especially as "at the present time it is difficult to state with clarity the effect of an expanding and changing international law of the sea upon disputed Federal/State claims . . . [and] the way a Court will approach the problem of maritime boundary will in the last resort depend upon its attitude to federalism as a theory and system of government" (pp. 288, 291).

Among the other contributions to the volume, Dr. Ryan examines problems of immigration, aliens and naturalisation and shows the way in which Australian immigration officials have used the "European language" requirement even to keep out Europeans. Apparently an immigrant of less than five years may be deported if "he is a person who advocates the overthrow by force or violence of the established Government of the Commonwealth or of a State or *of any other civilized country* . . . or is a member of an organisation which entertains or teaches" such doctrines (p. 477, italics added). It would be interesting to know whether this applies to those seeking to overthrow "Communist" or "Fascist" governments as well as those which the Australian authorities regard as democratic. A connected problem, that of extradition and asylum, is considered by Mr. Shearer, who suggests that the Australian courts would probably follow *Soblen* (p. 566).

The remaining papers deal with security arrangements, air law, visiting forces, diplomatic immunities, alien property, and such financial matters as state borrowing overseas, Australian participation in organisations like the Colombo Plan, and her position in GATT. In commenting on the last matter, Professor Alexandrowicz makes a point that is of fundamental significance to the Commonwealth and to the cold war divisions of the world: "In the present period of anxiety within the Commonwealth of Nations caused by the progressive reorientation of the U.K. towards European economy it is more than ever relevant to realise in this part of the world that Britain is nearer to Europe than to Australia and that the latter is nearer to Asia than to Europe" (p. 114).

International Law in Australia is a useful compilation, but its purpose is limited. There is still ample room for the definitive work on international law as applied and interpreted by Australia. In the meantime, those who seek some idea of Australia's role in a number of fairly obvious international legal matters affecting Australia will find it here.

L. C. Green.

PAGET'S LAW OF BANKING. Seventh edition. By MAURICE MEGRAH assisted by F. R. RYDER. [London: Butterworths. 1966. lxiii, 658 and 60 pp. 96s. net.]

PAGET is now the only authoritative practitioners' textbook on its subject, its excellent competitors, Hart and Grant, having failed to survive the war hiatus. New editions at fairly frequent intervals—on this occasion five years—are therefore very welcome.

I attempted an appreciation[1] of *Paget* in 1945 when the fifth edition, the first not to be edited by Sir John Paget himself, appeared. All the subsequent editions have come from the able pen of Mr. Megrah who in the sixth of them carried through a radical reorganisation of Paget's material which had been somewhat illogically arranged. This again I tried to describe and evaluate in this review at the time.[2] I do not wish to repeat what I said on those occasions, and will content myself by referring the interested reader to the earlier numbers of the review just mentioned.

The present edition is again a monument of careful and thoughtful editing. Mr. Megrah has added some eighty pages of text. It is true that a large part of this addition is due to a substantial expansion of the section on "land as a security for bankers' advances," and most of the remainder to the need for bringing into the text the effect of the unusually large number of decisions of the first importance which have been given in recent years, a task which Mr. Megrah has accomplished with his usual thoroughness and understanding. Nevertheless there is hardly a page of the text which has not been affected by his vigilant scrutiny: and this has resulted in many small but worthwhile alterations, a zealous attention which has been carried through into the contents pages, the chapter headings, numerous new headings within the chapters, and into other aspects of the book, including even the title, which becomes *Paget's Law of Banking*! The extent of the additions can be measured not only by the large amount of new text, but by the fact that six additional pages have been required for the Index.

As I have already said the major addition to the text is in the section on land as a security. The outstanding defect, and it was a serious one, in Paget's book was the chapter on securities which completely omitted interests in land; he attempted to justify this by arguing that it was part of the general law and not part of the law of banking. The real reason was almost certainly that he did not feel himself strong enough on that branch of the law.

[1] See (1948) 11 M.L.R. 360. [2] See (1962) 25 M.L.R. 756.

Mr. Megrah made a tentative move towards putting this right in the sixth edition. Evidently feeling that this was not enough he has enlisted the help of Mr. F. R. Ryder, a lawyer with long experience in the legal department of the Midland Bank, and whose contributions on legal subjects to the banking periodicals are well known. Personally, like Paget, I do not feel myself competent to attempt a critical assessment of Mr. Ryder's contribution, though I can say that on the whole it certainly presents a clear, well-balanced and not too detailed a conspectus of the subject, which should be readily intelligible to those who are not deeply versed in the subject—I confess however that the first paragraph on page 528 relating to agricultural holdings as a security has me beat. In this section also the paragraphs on the matrimonial home on page 530 are being overtaken already by the march of events, and the feminist enthusiasm of the Baroness Summerskill!

It is not necessary to comment in detail on the additions necessitated by the recent decisions, some of which are of course of outstanding importance, and I will content myself with a very few observations.

United Dominions' Trust v. *Kirkwood*[3] has led for the first time in years to a substantial addition to Chapter 1 which is concerned with the legal conception of the bank. Unfortunately this edition was already in type before the Court of Appeal gave its very differing judgments, described as "startling," so that Mr. Megrah was not in "a position to offer a detailed analysis." How far the practical effect of this decision has been modified by the Companies Act 1967 is difficult to judge, but the discussion therein of the legal nature of a bank by the Lords Justices will always have its importance.

In Chapter 2 the section on the accounts of joint stock companies has been much expanded as a result of the *Buckhurst Park Properties Case*[4] which has thrown a welcome new light on the *Turquand* line of cases; also there have been important cases on company winding up which very much affect bankers.

It is ironic that *Hedley Byrne* v. *Heller*[5] (there is a slip in the table of cases where the case is described as unreported though the citation appears in the text), one of the banking cases which has made an outstanding contribution to the general law, has effected comparatively little change in either the law or the practice of the comparatively limited banking area within which it operates though its repercussions may, I think, be wider than Mr. Megrah allows, for it affects responsibility for investment advice as well as bankers' references. It is well discussed in Chapter 7.

Part II which is concerned with cheques and is therefore *par excellence* of importance to bankers has required a number of additions as a result of the series of decisions involving the construction of the Cheques Act 1957, especially *Westminster Bank* v. *Zang*[6] and *Burnett* v. *Westminster Bank*[7] which is the first case involving the effects of "automated" accounting. In his Preface Mr. Megrah remarks challengingly that he has "retained" Paget's "deep treatment of the law relating to negotiable instruments particularly cheques" despite a "certain criticism." This is a very welcome statement as no other author has approached *Paget* in his discussion of the cheque, and it would be a thousand pities to cut these chapters.

The excellent chapter on Commercial Credits has also been expanded a good deal. This is not because it needed improvement; but because in the interval the conservative British banks have adhered to the uniform Customs and Practice for Documentary Credits of the International Chamber of Commerce which has been accepted in most foreign countries for some time

[3] [1966] 1 All E.R. 968.
[4] [1964] 2 Q.B. 480; [1964] 1 All E.R. 63.
[5] [1964] A.C. 465; [1963] 2 All E.R. 965.
[6] [1966] All E.R. 114; [1966] 2 W.L.R. 110.
[7] [1965] 3 All E.R. 81; [1965] 3 W.L.R. 863.

past. The 1962 edition of this is set out in an appendix, the only one in the volume—the changes which it effected were no doubt one of the reasons for the change in attitude of the British banks. These rules naturally affect internally the working of our documentary credit system in a number of respects though the British-American practice which had substantially established the framework of the whole system was in general conformity with them.

The type and layout have again been improved and are now very good indeed. For such a volume a price of 96 shillings is indeed moderate and compares very favourably with the general run of the prices for the leading textbooks in commercial law subjects.

C.

LEADING CASES IN THE LAW OF BANKING. Second edition. By LORD CHORLEY and P. E. SMART. [London: Pitman. 1966. 806 pp. 60s. net.]

THE first edition of this work was prepared expressly "for the young bank officer struggling to understand a difficult branch of the law." Such a golden-haired Adonis found, I am sure, that it was well suited for his needs. So did lesser breeds within the law: it gave to many of us quick and effective relief from legal indigestion.

The subsequent years brought fresh aches and pains. As to joint accounts came *Brewer* (1952), not followed in *Welch* (1955), distinguished in *Baker* (1955); as to commercial credits came *Powis* (1952) and the gloss of *Simaan-Tetcher* (1954); as to the banker as adviser came *Woods* (1958) (and the decline of *Banbury* v. *Bank of Montreal*) and of course *Hedley Byrne* (1963); as to limited companies *Freeman & Lockyer* (1964) now stands beside *Turquand*; the duty of care of the collecting banker was extended by *Bute* (1954), and against the background of the Cheques Act was *Orbit Mining* (1962) and, with alphabetic finality, came *Zang* (C.A. 1965). The new edition soothes us through these and other complications. It is a reliable product and from a much respected firm.

DAVID SHOUT.

CASES ON THE CRIMINAL LAW, PROCEDURE AND EVIDENCE OF NIGERIA (EXCLUDING THE NORTH). Law in Africa, No. 19. By CYPRIAN O. OKONKWO and IAN MCLEAN. [London: Sweet & Maxwell. Lagos: African Universities Press. 1966. xxx and 896 pp. (with index). £8 15s. net in U.K.]

THE design of this book clearly reflects the realities of legal practice, and law publishing, in Nigeria. It is a casebook for practitioners remote from their libraries, as well as for students. Half the book is devoted to Criminal Procedure, Appeals and Evidence; of the part devoted to substantive law, nearly one-fifth is given over to sedition and corruption.

Unfortunately, the book seems to have had more than its share of technical mishaps. The cross-references to, and entries in the Tables relating to, cases and statutes cited in Chapter 1 are almost all defective. Other references are correct in the text, but wrong in the Tables, *e.g.*, *Blackburn*, *Ng*, and *Linley*. The extract from *Onyeanuku*, at page 808, begins with a reference to "the facts as set out above"; but no facts appear, for the authors' policy has been to let the extracts from the judgments stand by themselves without adding any summaries of the facts. The extract from *Haddy*, at page 121, consists almost entirely of a quotation from an earlier, unidentified judgment—in fact *Cohen and Bateman* (1909) 2 Cr.App.R. 197.

Each chapter begins with a very short summary of the relevant topic.

On occasion these are so short as to be misleading. The passage on drunkenness, at page 242, mentions the availability of a defence of insanity caused by alcohol, and a reference is given to *Chutwood*, as an authority on drunkenness and provocation. Nothing is said of the relevance of intoxication as preventing the accused from forming "any intention, specific or otherwise, in the absence of which he would not be guilty of the offence," which is also discussed in *Chutwood*, and must be of much greater practical importance. Practitioners remote from their libraries will scarcely welcome the comments to some extracts which take the form, "But see such-and-such," with no indication of the point on which the comparison is to be made.

This is obviously going to be a very useful book. It is a pity that one cannot give it an unqualified welcome.

DAVID MCCLEAN.

SOVIET CRIMINAL LAW AND PROCEDURE: THE R.S.F.S.R. CODES. Translated by H. J. BERMAN and J. W. SPINDLER, with an Introduction by HAROLD J. BERMAN. [Harvard University Press. 1966. 472 pp. and index. £4 16s. net from Oxford University Press.]

THIS attractive volume contains the two Russian Penal Codes of 1960 which previously appeared in the series *Soviet Statutes and Decisions*, and the 1960 Judiciary Law. The important 1961 and 1962 amendments to the Codes are incorporated in the texts. There is a valuable and lucid Introduction by Professor Berman which explains the place of Codes in the Soviet legislative hierarchy and the role of statutes creating minor offences, and describes the history of codification in this field since the Revolution. There is a good description of the changes in the 1960 Codes in the light of the serious abuses which existed under the older law and which here find correctives, and the discussion of the "presumption of innocence" is particularly authoritative (pp. 79–87). The account of trends of modern Soviet law for the future (at pp. 182–185) might have been extended with profit, as this legal system changes so bewilderingly. The main value of the work is as a barometer of Soviet crises, since Soviet law develops in response to external stimuli rather than internal logic. It forms a useful reference work throughout the field.

A review of a translation is seldom apposite but Professor Berman advances a positive theory (p. 181) for avoiding facile equation of Russian with Anglo-American institutions—in line with his general view of the "Russianness" of Soviet Law. Hence the style of the translation, unlike the splendid style of the Introduction, is so literal as to amount in places to "broken English," doing scant justice to the skill of either the Soviet draftsman or the American editor. French and German law are closer to Russian law but their translators do not hesitate to use a well-known idiomatic word, *e.g.*, Berman and Spindler talk of "assigning punishment" (Art. 37) instead of "determining" or "inflicting" it, whereas the French (Centre français de Droit comparé) call it "fixation" and the Germans (Freie Universitaet Berlin) "Verhaengung," which makes sense to their lawyers. Article 194 is translated "unwarranted appropriation" although it means "usurpation" and the French translate it "l'usurpation" also. The translation of Article 281 is so tortuous as to be meaningless: "Evasion by relatives of a person of refusal to engage in a blood feud with respect to the slayer and his relatives, when the refusal is to be carried out in accordance with the procedure established by the statute on reconciliation proceedings in cases of blood feud, shall be punished, etc." Compare the clarity and economy of the French: "Le fait pour les parents de la victime de se soustraire à la procédure de conciliation impliquant la renonciation à la vengeance personnelle contre l'assassin et sa parenté est puni, etc." In Article 237 an activity is penalised which "is connected with causing harm to citizens' health." The

term "svyazany s" is translated in quite a modest dictionary published in Moscow by the English words "entailing" or "involving." Why should the translators speak worse English than the Russians? "Connected with" could mean anything. The French "dont l'activité s'accompagne de pratiques nuisibles à la santé" is again clearer.

In the translation of the Procedure Code the translators have also been more timid than the French and Germans. They avoid the word "indictment" in Article 205 and say "conclusion to indict" though it is broadly an indictment. The Germans translate it "Anklageschrift" which is clearer and may be translated as "bill of indictment" in English. Chapter 21, referring to trial proceedings, is labelled "judicial examination" ("Gerichtsverhandlung" is idiomatic in the German version), and Chapter 28 is labelled "judicial investigation" though in fact it refers to the "trial" or "hearing" and is translated by the French, again idiomatically, as "L'audience."

Needless to say, most of the translation is of excellent quality, where there has not been the same need to "avoid confusion" with similar but allegedly unidentical institutions.

A. K. R. KIRALFY.

NIGERIAN LAW OF LANDLORD AND TENANT. By M. O. ONWUAMAEGBU, B.A., LL.M., PH.D. (London), of the Inner Temple, Barrister-at-Law; Solicitor and Advocate of the Supreme Court of Nigeria. [London: Sweet & Maxwell Ltd. Lagos: African Universities Press. 1966. xxxv and 332 pp. £8 8s. net.]

THIS book, despite certain shortcomings, is a most welcome addition to Messrs. Sweet & Maxwell's Law in Africa Series. It is significant that of the sixteen currently published titles no less than twelve are concerned with Nigerian law. This is no doubt in some measure a consequence of the country's recent economic boom which now supports in varying degrees of affluence some two thousand legal practitioners. It is probably still not generally realised that in order to transform a backward underdeveloped community into something approaching the sort of society the incidents of which the developed countries in the free world tend to take for granted, an efficient and well-organised legal profession operating a tidy and comprehensible body of laws is essential. These factors have been sadly lacking in Commonwealth West Africa in general and Nigeria in particular. The causes, such as in the past a ludicrously inadequate education for a fused profession (mainly at the English Bar), the African's reluctance to practise in partnership, the unsuitability of much customary law to regulate day-to-day affairs and so on, do not concern us here. What we must be grateful for is the enterprise of those publishers who, starting virtually from scratch, have now produced a library which makes the academic study of Nigerian law and the development of the country's jurisprudence more a practical possibility.

This work seeks to give an account of what has been called "the hideous jungle of confused legislation and mixture of customary and received English law" which comprises the Nigerian law of landlord and tenant. Some of the author's difficulties may be imagined when it is explained that leaving aside all question of customary and received law, the local legislation in force in Nigeria varies substantially between the North, East, West and Mid-West Regions and the Federal Territory of Lagos. Thus, for instance, titles registration applies to almost all Lagos, but elsewhere there is merely a system of instruments registration; rent restriction legislation applies only in certain scattered townships and on top of this the Northern Region has an entirely different system of land tenure.

The author tackles his task methodically and after discussing the creation and incidents of tenancies (most of this familiar to English lawyers) he goes

on to discuss the impossibly confused rent restriction legislation, "a hurried and patchwork piece of legislation deriving somewhat uncertainly from English Acts of 1915, 1920, 1933, 1939 and 1954" (p. 284). (It is unfortunate in this connection that the author does not mention that as a result of this legislation, sale of land at a ground-rent is illegal in the areas subject to the Acts.) Thrown in for good measure is a final chapter on succession to the rights of landlord and tenant.

The complexity of the topic is such that it is perhaps almost forgivable that there are a number of infelicities, and sometimes patent inaccuracies, in the text. For instance, on p. 89 it is stated that registration of a lease under the Registration of Titles Act, Cap. 181, "provides the lessee with a state guaranteed title." This is unfortunately not the case and hence the reason for the passing of the important Registered Land Act 1965 which the author omits to mention. The author also appears to think that only a small area of Lagos is affected by the titles registration legislation, whereas in fact virtually the whole of the Federal Territory is now subject thereto. His treatment of rent control omits a reference to the Rent Control (Lagos) Amendment Act 1965 (now amended by the Rent Control Decree 1966). On p. 56 there is a reference to "statute of irremovability" which might perhaps be a good title for the English Rent Act 1965, but the author really means "status." Regrettably there is a complete absence of any useful precedents to aid legal practitioners in drawing up leases appropriate in Nigeria, nor is there any discussion of practical matters such as stamp duties and leasehold conveyancing practice. In many ways there is in Nigeria more need for material of this nature than the academic treatise largely confined to theory.

Nevertheless, Dr. Onwuamaegbu has accomplished his onerous task with considerable credit. It is hardly his fault if the most the average reader may expect to acquire on completion of the book is a feeling that (to adapt F. E. Smith) if he is none the wiser he is at any rate infinitely better informed.

BRIAN W. HARVEY.

SIR JOHN LATHAM AND OTHER PAPERS. By ZELMAN COWEN. [Melbourne: Oxford University Press. 1965. x and 191 pp. £3 6s. 6d. net.]

A COLLECTION of papers from Professor Cowen is always welcome. The five that make up this book all represent some aspect of the author's varied interests in the field of constitutional law, but there is no closer connection. They were prepared for different occasions and two have previously appeared in the *Melbourne University Law Review*.

The first two papers, expanded versions of the Macrossan Lectures delivered in 1965 in the University of Queensland, deal with the political and legal career of Sir John Latham. They form a warm and discerning tribute to the man who as Chief Justice of the High Court of Australia did so much to lay the foundations upon which the court's present reputation rests. The first paper describes Latham's political career. It deals in particular with his term as the Nationalist Party Attorney-General under Bruce from 1926 to 1929—during which time Latham represented his country at the Imperial Conference—and then as Leader of the Opposition in the first depression years. The second paper is concerned with Latham as a lawyer, and concentrates on the connecting threads in his decisions as Chief Justice on constitutional issues. Professor Cowen finds it difficult to attach any very striking character to the sum of Latham's contributions: "Overall he set out in his constitutional cases to do what he did in all his judicial work: to exclude all but legal considerations, to expound his case carefully and in detail, often in such very great detail, and to reach at length the result to which his beloved logic led him." The tradition of approaching the Constitution in a closely confined legal way has become characteristic of the many members

of the High Court but it is a technique which has nonetheless led different judges to very different conclusions about the underlying relevance of political and social realities. Professor Cowen demonstrates how legalism sent Latham in pursuit of answers to be found in the text of the Constitution itself rather than in underlying principles. In this Latham is contrasted in particular with Sir Owen Dixon, who succeeded him as Chief Justice. The theme is fascinating, and one on which it would be most interesting to have Professor Cowen write at greater length.

Of the other essays in the book, two are specifically Australian in subject-matter: one surveys the history of the constitution of the State of Victoria during its first hundred years from the grant of representative self-government. The other deals with the constitutional problems arising out of the ownership of land by the Commonwealth within territory belonging to a State.

The fifth essay is perhaps of greatest general interest. It compares the law of criminal contempts of court in England, Australia and the United States, with particular reference to the freedom of the press to comment on judges and on cases which are *sub judice*. In Australia, the applicable law is mainly English common law, but Professor Cowen draws attention to certain specifically Australian developments, for instance, the High Court's decision in *James* v. *Robinson* ((1965) 109 C.L.R. 593) that a newspaper cannot be guilty of contempt in publishing reports of the hunt for a criminal when his arrest is imminent; and the lack of court protection for a person committed for contempt of Parliament that was revealed in *R.* v. *Richards, ex p. Fitzpatrick and Browne* ((1955) 92 C.L.R. 157). The principal contrast, however, is between the wide-ranging control provided by English-Commonwealth law and the considerable liberty afforded the press by the restricted ambit of the contempt power laid down by United States judges. Professor Cowen reaches the conclusion that in respect of prejudice to criminal proceedings "the preferred American freedom of the press is bought at too high a price." But this conclusion is put forward tentatively in recognition of the paucity of knowledge, surrounding the central problem of how far jurors are likely to be influenced by the publication of prejudicial matter. Whether or not the English approach strikes the right balance, the author stresses the inconsistency of restricting press reports of a pending prosecution but allowing full reports of the committal proceedings. He therefore favours enactment of the recommendations of the Tucker Committee, an event which has taken place in England since he wrote.

W. R. CORNISH.

OF LAW AND MEN. By FELIX FRANKFURTER. [Hamden, Connecticut: Archon Books. 1965. xiii and 364 pages.]

THIS is not a new book. It was first published in 1956. The pieces it contains had virtually all been published even before that. The earliest is dated 1939; the latest, 1955. But since not everyone is an avid reader of both the *Connecticut Voter*, the organ of the League of Women Voters of Connecticut, and the *Clare Market Review*, one of the London School of Economics student journals, it is useful to find such scattered publications arrayed under one hard cover. The book, unlike Gaul, is divided into four parts: the first is called "Law and the Judicial Process," and consists of a number of longish essays on general legal topics; the second is called "The Judicial Process in Action," and largely consists of thumbnail sketches of American judges whom Frankfurter had known; the third is, rather pompously, called "Directions of American Democracy," and consists of a few short notes on assorted political topics; the fourth is called "In Memoriam," and largely consists of obituaries of people Frankfurter had known, but who had not achieved judicial status.

The first section is probably the least interesting. The essays are neither particularly profound nor wholly original. They do however demonstrate Frankfurter's remarkable range and style. How many English judges, one wonders, could quote so well (or at all) from Isaiah Berlin and Jacques Maritain, or even from Max Gluckman and Stanley de Smith? And how many would dare to use adjectives like "sleasy" and "snide" (even if they knew what they meant), or to coin words like "judgmatical" (as opposed to mechanical) and "uniquity" (the quality of being unique)? It was not for nothing that Frankfurter's advice to a young man thinking of taking up law was simply to read as widely outside the law as possible. The most interesting essay in this part of the book is the first which deals with John Marshall and the early years of the Supreme Court. Frankfurter's account is redolent with the atmosphere of an age in which the Supreme Court bench contained judges rejoicing in such names as Bushrod Washington and Brockholst Livingston.

He is at his best in this anecdotal vein which enlivens the second and fourth sections. Fortunately he did not believe in the maxim *nil nisi bonum de mortuis*. He deals with the five Chief Justices he had known, pointing out that their influence was in many ways greater than that of the Presidents who appointed them, as a comparison of their respective terms of office indicates. He also deals with the other leading members of the court during this period, such as Holmes, Brandeis and Cardozo. The only judge of a lesser court to be included is, inevitably, Learned Hand. In this connection it is fascinating to note that in Frankfurter's opinion the greatest judges to sit on the Supreme Court have been, with only two exceptions, men without previous judicial experience.

The political essays are slight, and permeated with the peculiarly American version of freedom which seems so shallow to some of us. They do however contain an essay on the freedom of the press which should be made compulsory reading for the authors of those dreary and disgraceful leaders forever advocating the reporting of committal proceedings. He also has some home truths for law teachers. We might all consider this: "in a faculty of predominantly great teachers, issues touching the formal contents of a curriculum recede into appropriately subordinate importance."

COLIN TAPPER.

INTRODUCTION TO ENGLISH LAW. By PHILIP S. JAMES. Sixth edition. [London: Butterworths. 494 and 88 pp. 22s. 6d. (Paperback); £1 15s. (Library edition).]

THIS excellent book deserves the success of its rapidly succeeding editions. It is just the right kind of introduction for the full-time and part-time law student and the general reader, for the presentation is elementary without being shallow and usually brings to life the purpose and working of the legal provisions. In the preface the author shows concern over the growing length of his book. This is surely unavoidable, for the rate of growth of new material usually exceeds the rate of decay of the old. Besides, a writer who wants to paint a vivid picture of his subject must needs spread himself to some extent. Moreover, few readers will have to read the whole book, and they are worried about the length only because it means a higher price, but as long as the publishers can keep the price as low as they have so far done with this book any buyer makes a good bargain.

It is the freshness of expression which distinguishes this *Introduction* from a number of similar works and which makes it such a useful teaching aid, particularly in so-called professional courses. The reviewer has used this book with success in evening courses for bank clerks. A section that

does not come up to the usually high standard is that on negotiable instruments which, because it is so short, gives the student too little to stimulate interest and promote understanding.

The material has been brought up to date throughout, and this has made this book useful also to the lawyer in search of information in a field which is not his own.

O. C. Giles.

Elements of English Law. By William Geldart. Seventh ed. by D. C. M. Yardley. [London: Oxford University Press. 1966. 182 pp. including bibliography and index. 7s. 6d. net.]

This well-known introduction to English law has now reached a seventh edition. The new editor, Dr. Yardley, has followed closely the arrangement of preceding editions, and has skilfully modernised the text by deft interstitial alteration—mainly the incorporation of changes effected by statute- and case-law. Thus, while remaining unmistakably Professor Geldart's creation, the book is, in the summaries of various branches of law which it contains, remarkably well up to date. That, at least, is so of the descriptions of substantive law, though in some other respects the text has a somewhat antiquated ring. In these days of social security benefits and feminine equality, the earnest discussion of the risks which "tradesmen" run in dealing with married women could surely be curtailed; also, in your reviewer's opinion a wholly misleading impression is given of the sort of provisions typically found in modern settlements of property.

Many readers will be familiar with the lay-out of the book. It begins with two excellent chapters on statute-law and common law, and common law and equity, and then in six further chapters covers in outline some of the main parts of English substantive law. Those last six chapters amount to a triumph of compression and manage to include a staggering range of legal rules, which (though it was perhaps over-ambitious to attempt to deal with mistake in the law of contract in one-and-a-half pages) are, in general, concisely and accurately stated.

Even so, your reviewer has his doubts, and the main one is: what sort of person is supposed to read this book? Those already qualified in law will doubtless admire the skill with which it has been written, but are hardly likely to learn a great deal from it. Presumably it is intended as an introduction for the beginner, but it is highly questionable whether it is suitable as such. Economy of space has been achieved by a heavy use of technical language, usually not illuminated by factual examples, and, for all the felicitous phraseology of Professor Geldart and his editors, it will require a remarkably perspicacious reader to remain awake throughout it all, let alone to understand and remember its full significance. What, for instance, is the beginner going to make of this?

> "Mortgages can be made of chattels personal as well as of land. A mortgage of debts and of equitable interests in personalty can be made in the form of a conveyance by the mortgagor to the mortgagee with a proviso for redemption. The priority of successive mortgagees depends on the date when the mortgagee gives notice to the debtor or trustee."

Or this?

> "By conversion of goods is meant any act in relation to goods which amounts to an exercise of dominion over them, inconsistent with the owner's right of property. It does not include mere acts of damage, or even an asportation which does not amount to a denial of the owner's right of property."

Nevertheless, earlier editions have obviously met with much success, and your reviewer may well have the future pleasure of learning that his pessimistic assessment of the utility of this one has been unfounded. It is nicely produced in the OPUS series, and has a bibliography and an index of considerable value.

A. E. W. PARK.

THE BOOK OF ENGLISH LAW (as at the year 1966). By EDWARD JENKS. 6th revised edition by P. B. FAIREST. [London: John Murray. 1967. xvi and 376 pp. 35s. net; paperback 25s. net.]

THE new edition of this popular book is welcome. Since the last edition in 1958 several books with kindred aims have been published; but the difference between *Jenks* and most of the newcomers is striking. Though simplifying problems to appeal to the general reader and the raw beginner this book is never shallow, and though illustrations are perhaps not as numerous as some readers would hope the narrative is usually vivid and always lucid. Many problems are discussed historically so that they can be related to a reader's basic knowledge of English history, and here and there controversial opinions are mentioned, adding depth to the story. The book can be read with advantage also by candidates for examinations, using it to test their knowledge of cases which are the basis of the brief statements of law in the text.

There are hardly any points which a reviewer could fairly criticise. As regards the original text the explanation given for the absence of torture in common law trials is perhaps a little too simple, seeing that the jury as it is now known emerged only at a comparatively late date. (See Holdsworth's *History of English Law*, Vol. 5, pp. 185–187.) Unless the problem is by then resolved the editor of a later edition might well include a few words on the topical and controversial question of Crown privilege. The passages referring to mental disability require revision; although the Mental Health Act 1959 is of course referred to, the editor, discussing contractual capacity, has retained the now obsolete terminology, describing mental patients as lunatics, and the Court of Protection is not mentioned.

A useful bibliography at the end of the volume should help those wishing to go deeper into the matters discussed. In the text modern literature is rightly not referred to—with two perhaps puzzling exceptions, Winfield's textbook on *Torts* and Wedderburn's *The Worker and the Law*, which thus score two mentions.

The editor has clearly been right to retain the words of the author. He is also to be congratulated on the manner in which he has introduced changes in the law planned at the time of going to press. On the other hand, the brief chapter on law reform at the end concludes on a note which while doing credit to the writer's sentiments is hardly realistic; in the modern world no reform of the common law is likely to have much effect outside the United Kingdom.

O. C. GILES.

COWEN ON THE LAW OF NEGOTIABLE INSTRUMENTS IN SOUTH AFRICA. Fourth edition. By DENIS V. COWEN and LEONARD GERING. [Cape Town: Juta & Co. Ltd. 1966. xxxix and 609 and (index) 51 pp. Available from Sweet & Maxwell Ltd. £9.]

ALL lawyers must surely look back affectionately on certain textbooks that have given them, however temporarily, a pleasurable understanding of intricate problems and the cheerful assurance that for years thereafter a little re-reading will fit the mind into the right gear again. Such a text is not

common—and I daresay that like good golf it looks deceptively easy—but whatever else is required its clarity must keep pace with its scholarship.

Cowen on the Law of Negotiable Instruments in South Africa has the qualities of such a book. It is now in its fourth edition, and is a legal classic by any definition, but in this country too little known. Perhaps the title is inevitable but it is certainly misleading for there is no other text that provides a more comprehensive or stimulating commentary on the Anglo-American system of negotiable instruments. It has the broad sweep and yet the encyclopaedic detail; the study of principle is set against the background of comparative law and there is throughout careful analysis expressed in straightforward terms.

The result is a book well suited both to the professor and the practitioner. The former will be sufficiently impressed by the bibliographical notes in Appendix II to know that this is a book that he cannot easily ignore and he will lead his post-graduate students to it. But the English practitioner, though he may specialise in banking or commercial work, will be reluctant to believe that a book purporting to deal with South African law can be worth adding to his library. In fact he will find here a penetrating study of familiar problems with the English rules considered in great detail and then held up against the light of comparative law. This is instanced by the section relating to damages for wrongful dishonour of a customer's cheque which forms part of Chapter XXI. It is a matter on which the English authorities are somewhat inconclusive and culminate in the decision of Lawrence J. in *Gibbons* v. *Westminster Bank* [1939] 2 K.B. 882. It will be remembered that the English rule entitles the customer to substantial damages without the necessity for proof of special damage, but only if he is a "trader." Cowen analyses the rule: there are difficulties as to its scope, with Lord Chorley expressing the view that it should be extended to the armed forces and professional men generally, and Paget that it should only apply to the customer who is in business; there are difficulties as to the extent of any special damage that may be claimed, with the principle in *Hadley* v. *Baxendale* clashing with the doctrine of "proximate causation"; there are difficulties as to whether or not the award is confined to pecuniary loss, and as to the juristic basis for the rule, that is to say whether it is akin to tortious liability for slander of commercial credit, whether it is based on contract, or whether it is *sui generis*. From such a beginning who is not going to turn the pages to that part of the section entitled "Developments in the U.S.A."? That is prefaced by the comment that American lawyers have given closer and, it would seem, more scientific attention than have their English counterparts both to the theoretical foundations and to the precise scope of the action, and contains a discussion of the merits of seven possible bases for awarding damages for wrongful dishonour and of the provision in the Uniform Commercial Code. Some time the English rule will have to be considered by the Court of Appeal and in this, as in much else, Cowen has admirably assembled and examined the relevant material.

Chapter XXI, which is just short of 100 pages, relates to the payment, collection and crossing of cheques and is necessarily the chapter likely to attract most attention. Discussion extends into the footnotes, but these do not overwhelm the text and have been kept well weeded. Whilst the references give an indication of the range of the book and the enormous extent of research that is its background and whilst the banking and legal literature and case law have been drawn from many countries, the material is very much to the point and by no means unwieldy. In regard to the crossing of cheques, the differences between the South African and the English law are not likely to be of much concern to the English reader, but on the many matters of general interest Cowen provides a review of modern problems that is extremely valuable. The pages relating to the recovery of

money paid by mistake are of especial importance, and the challenge to the doctrine of *Price* v. *Neal* makes powerful reading.

At certain isolated and comparatively limited points in the South African law of negotiable instruments the Roman Dutch law has prevailed and brought in the continental influence, in particular as to the aval and the requirement of value. But it is English law that has been by far the predominant force, and so it is that Cowen in dealing with many of the South African problems is discussing fundamental English ones. There is now the South African Bills of Exchange Act of 1964 which has replaced the separate statutes formerly applicable in Natal, the Cape, the Transvaal and the Orange Free State; each of these had followed in varying degrees the English model and the 1964 Act re-enacted all that the previous statutes had in common, and where they differed, chose individual provisions from one or another of them. Accordingly the Act provided a much needed consolidation and brought uniformity, but nonetheless it missed the opportunity of rectifying well known defects, left old doubts unresolved and added a few more. It is a story that has been heard before. And again we find, as in Canada, that on occasions the draftsman instead of strengthening or building upon the framework of Chalmers, has made changes that are trivial for reasons that are obscure and result in quite needless confusion. But there is an interesting and welcome innovation: the South African legislature in providing protection to the paying banker in the absence of any indorsement or regular indorsement of a cheque or analogous instrument did so in terms which followed much more closely the recommendations of the Mocatta Committee than did the English legislature, and in the result sections 88, 84 and 85 of the South African Act appear preferable to sections 1, 2 and 3 of the English Cheques Act 1957. Both statutes, however, will yield problems of common interest, and the English and the South African law will develop broadly along the same lines.

The authors in their preface express particular indebtedness to reviewers generous enough to suggest improvements. But I for my part have found it difficult to keep my enthusiasm for their work within reasonable bounds. It is a well written book that deserves unstinted admiration and goes beyond the limits of conventional legal scholarship.

D. A. L. SMOUT.

PRINCIPLES OF REGISTERED LAND CONVEYANCING. By J. A. HOLLAND, LL.B. and J. R. LEWIS, LL.B. [London: Butterworths. 1967. xiii and 222 and (index) 17 pp. Paperback. 30s. net.]

PROFESSOR Cheshire once confessed (in a Preface to his celebrated work on Real Property) that he found the topic of registered conveyancing "not a little unpalatable." It is to the credit of Messrs. Holland and Lewis that, in their new book, they have nevertheless garnished their fare with some very piquant writing. One reads with interest, for example, of the Land Registry's "Nelson's eye" that it turns towards some imperfect titles, and of the fact that "the authors understand that the unfulfilled ambition of most of the Land Registry Staff is to grant a qualified title to an applicant."

The authors state that their book "is intended primarily for students of land law and conveyancing" but go on to add "in view of the comparatively recent arrival of the registered title to land it may be said in this sphere most of us are students; in that sense it is hoped that the practising solicitor may also find this book of some value." One's comment on this is that the book is likely to be of great value to practising solicitors, being very detailed and practical in its approach but for this reason perhaps of less value to the average law student than, say, the

sections on registered conveyancing in *Cheshire* or in *Megarry and Wade*. To point the contrast, there is in *Holland and Lewis* an Appendix describing ninety common land registry forms, but the Table of Cases refers to only sixteen cases, omitting any reference for example to *Bridges* v. *Mees* [1957] Ch. 475 or *Re Boyle's Claim* [1961] 1 W.L.R. 889. The "cavalier brevity" with which the authors confess to having treated certain topics of the substantive land law might, too, provide a handicap for many law students. As an advocate of the beneficial effect of title by adverse possession, your reviewer would take issue with Messrs. Holland and Lewis on their sentence "the theft of land in this country has merited individual treatment by parliament in the form of the Limitation Act, 1939." Surely, deliberate "theft" of land is not the commonest kind of adverse possession? Possession taken by mistake, *eg.*, as to the location of a boundary, is probably more common.

I would recommend a law student to read the introductory chapter to this book, for it is well written and readable but would warn him that he might find the remainder of the book more valuable to him when he becomes a practitioner, to be used as a tool of his trade, than as a first insight into the place of registered conveyancing in the English land law.

MICHAEL J. GOODMAN.

CORRESPONDENCE

THE EDITOR,
The Modern Law Review.

Dear Sir,

The attention of the judges of Rhodesia has been directed to an article by Mrs. Claire Palley appearing in Volume 80, No. 8, May 1967, of your journal, and entitled "The Judicial Process: U.D.I. and the Southern Rhodesian Judiciary." I have been asked to draw your attention to certain features of this article. There are factual inaccuracies in that portion of the article which deals with the individual judges—inaccuracies which could hardly have occurred if any serious attempt had been made to check their correctness. I do not propose to itemise all the inaccuracies but there are two to which I feel compelled to draw your attention.

At pages 266–67, in referring to the Chief Justice, the writer states:

> "In 1950 he negotiated with the British Government for closure of voters' rolls against further African enrolment, to be compensated by an increase in the size of the Legislative Assembly to forty, including two Europeans specially elected to represent Africans, but eventually reached a compromise whereby the property and wage qualifications for the franchise would instead be raised."

There is no truth in this statement nor any foundation for it. The Chief Justice was elevated to the Bench in July 1950, and the Bill referred to was not introduced until the beginning of 1951.

At page 271, the writer states:

> "The judges' wish to take up an intermediate position was manifested when they informed the Speaker of the Rhodesian 'Parliament' and Mr. Smith that because litigation involving the standing of the 'Government' and possibly of 'Parliament' itself was pending they considered it

proper that they should stand aloof from 'parliamentary' proceedings and should not attend the official opening by the Officer Administering the Government. However, the Hon. Mr. Justice Macdonald accepted an invitation to attend the ceremony, during which he sat in the Distinguished Strangers' Gallery."

No invitation was received by Mr. Justice Macdonald, no invitation was accepted by him and he has not attended any opening ceremony of Parliament since U.D.I. The Distinguished Strangers' Gallery contains only about thirty seats situated in a prominent part of the House, and it is difficult to understand why a mistake of this kind was made.

I feel sure that a journal such as yours would not wish inaccuracies of this kind to remain uncorrected.

D. H. SPAFFORD.

Registrar of the Appellate Division of the High Court

Salisbury, Rhodesia.

THE EDITOR,
Modern Law Review.

Dear Sir,

It is not surprising that an attempt has been made to discredit an article which potentially damages the image of judicial impartiality in Rhodesia by showing the involvement of judges in the political situation and the indirect political succour rendered to the Smith Regime by their decisions. Criticism of the *Madzimbamuto* judgment also led to the unsuccessful prosecution for contempt of court of a university student who had published a poem implying that Lewis J. had been biased.

The weakness of the Registrar's case is indicated by the fact that he meets my carefully checked findings with a general charge of "factual inaccuracies," with bare assertions, and with a totally unsubstantiated allegation that I had failed to observe the normal canons of care expected of a scholar. The Registrar bases this case on inaccuracies relating to two minor points of detail. Not only was the article intended to be scholarly, but, because of the seriousness of the criticisms I was making, I took extra care in checking the evidence for my statements. The information about the judges was obtained from a number of reliable sources and the biographical data were cross-checked against official biographies supplied by the Library of the "Parliament of Rhodesia." I am unaware of inaccuracies and I would be grateful for notification of any.

Two specific points are raised by the Registrar. First, he denies that Mr. Beadle (as he then was) was party to the negotiations in 1950 for the closure of voters' rolls against further African enrolment. At the end of 1949 Mr. Beadle was despatched to London by Sir Godfrey Huggins (later Lord Malvern) to oppose the Central African Council. While there early in 1950 he was instructed by Huggins to cease urging a closure of the rolls upon the British Government. (This had been requested by various cabinets of which Mr. Beadle was a member since 1946.) Instead Mr. Beadle was to advocate raising of the property and wage qualifications for the franchise: (see L. H. Gann and M. Gelfand, *Huggins of Rhodesia*, Allen & Unwin, 1964, p. 217. For this authorised biography access was had to Lord Malvern's

involved in this project was confirmed to me in a series of personal interviews with Lord Malvern in November 1962. For evidence of Mr. Beadle's long-held views that "the native is not ready to take his part in politics" and that "the rolls should be closed as far as the registration of further natives is concerned" see, *e.g., Southern Rhodesian Legislative Assembly Debates* Vol. 24 col. 2611, November 27, 1944. Sir Godfrey Huggins and his Ministers won the 1948 Rhodesian election primarily on this issue so that it became necessary on August 5, 1950, to ask their Party Congress to endorse the vital change in policy above-mentioned. Mr. Beadle was, until July 1950, a member of the Cabinet and because of Sir Godfrey Huggins' strict observance of the doctrine of collective responsibility, must have been involved in the decision to raise the voters' qualifications, although the Prime Minister himself worked out final details with Her Majesty's Government. In view of the long period of gestation of bills—especially on so controversial a topic—it is unbelievable that in July 1950 the Minister responsible for the administration of the Electoral Act, Mr. Beadle, did not know of a proposed bill suggesting changes of such magnitude even though the bill was only printed late in 1950 (A.B.44/1950).

So far as the second item is concerned, I inferred that Mr. Justice Macdonald had accepted an invitation to attend the ceremony of the opening of "Parliament" on June 22, 1966 from the fact of his presence at this occasion. Before stating in the article that the judge had been present I twice checked this and my information was independently corroborated. In the light of the political situation in Rhodesia it would be unfair to my private papers which are closed to other researchers). That Mr. Beadle was informants to name them. Since receipt of the Registrar's letter the information was rechecked; there does appear to be some doubt about where Mr. Justice Macdonald sat, but seems no doubt that he was present, unless there has been an unlikely error of identification. Is one to imply from the Registrar's denial that he does not consider the occasion to have been an "opening ceremony of Parliament" because there has been no "Parliament" since U.D.I.?

Reference was made in the article to Mr. Justice Macdonald's views in *R.* v. *Madubutti* that U.D.I. might not be used as an excuse for the taking of human life or for violence against persons or property. Since then these views have been relied upon by Mr. Lardner Burke, the "Minister of Justice," in introducing mandatory death sentences for persons entering the country armed with lethal weapons: see debate on the Law and Order (Maintenance) Amendment Bill 1967: *Rhodesian Parliamentary Debates* Vol. 69 col. 284, September 8, 1967. The "Minister" in "stressing the need for a mandatory death sentence for certain types of terrorist activities" also drew attention to the remarks of a High Court judge on August 15, 1967 that had the court had power to impose the death sentence on terrorists who entered Rhodesia with weapons such as machine guns, he would seriously have considered imposing it.

One can understand the embarrassment of the Rhodesian Judiciary about an article which dents its carefully constructed non-political image and one is pleased that nothing in the Registrar's letter casts doubt on the contentions of the article.

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MAINTENANCE AND ESOTERISM

THAT our law of family maintenance urgently needs radical reform is evident from the priority given to it in the First Programme of the Law Commission, in pursuance of which the Commission have now issued a Working Paper of 128 pages entitled "Matrimonial and Related Proceedings: Financial Relief." [1] A forceful reminder of the difficulties with which the courts are meanwhile compelled to struggle is to be found in the recent and important decision of the Court of Appeal in *Northrop* v. *Northrop* [2] which drew from Diplock L.J. the anguished complaint: "I have seldom heard sustained citation of authorities on matrimonial causes without an uneasy feeling that family rights form a branch of the law into which the courts have introduced esoterism where Parliament intended only simplicity." Before embarking upon an analysis of that case and of its relationship to the Law Commission's proposals, it seems pertinent to review briefly what appear to be the chief defects of the law of maintenance that prompted such a judicial *cri de coeur*.

DEFECTS OF THE PRESENT LAW

First and foremost is its complexity, a complexity born of its long historical evolution. As common law, equity and statute have each in turn laid down their deposits of legal rules, the law of maintenance has become a treacherous quagmire through which textbook writers vainly essay to chart a path for bewildered students and harassed practitioners.[3] Moreover, rules have been retained from social contexts wholly different from those that prevail today. For

[1] Law Commission's Published Working Paper No. 9.
[2] [1967] 2 All E.R. 961 (C.A.); [1966] 3 All E.R. 797 (D.C.).
[3] Bromley, *Family Law* (3rd ed., 1966) spreads consideration of the law of maintenance over no fewer than six out of a total of 24 chapters, *viz.*, Chap. IX "Separation and Maintenance Agreements," Chap. XI "Maintenance during Marriage," Chap. XII "Separation and Maintenance Orders Made by Magistrates' Courts," Chap. XIII "Maintenance after Divorce and Nullity," Chap. XVII "Parents' Rights and Duties to Legitimate Children: B. Maintenance" and Chap. XIX "Illegitimate Children: B. Maintenance." A more systematic, if less detailed, statement of the law is to be found in Johnson, *Family Law* (2nd ed., 1965), Chap. 6 "Maintenance"; but maintenance between parent and child is dealt with in Chap. 11 "Parental Obligations in respect of Children."

instance, the wife's right to pledge her husband's credit made sense as the counterpart of the crude common law doctrine whereby the husband became master of his wife's property,[4] but it has little relevance to present-day realities, when the destitute wife turns naturally for help to her local office of the Ministry of Social Security.[5] Worse still, such logic as yesterday's rules may have had tends now to be distorted as the courts strive to adapt them to current social needs, which (as it is proposed to show) was the dilemma facing the Court of Appeal in *Northrop*.[6] Nor (contrary to what Diplock L.J. suggests) has statute brought simplification. Rather it has added confusion by creating not one legislative "code" to govern maintenance but two: the Matrimonial Causes Act 1965 (replacing the earlier Acts so named), on the one hand, and on the other, the Matrimonial Proceedings (Magistrates' Courts) Act 1960 (replacing the Summary Jurisdiction Acts 1895–1949).[7] And each code has been given, or acquired through interpretation, its own idiosyncrasies, even when using ostensibly identical concepts, such as "wilful neglect to provide reasonable maintenance."[8] Indeed it is an abuse of the term to apply the word "code" to these legislative labyrinths.

The second defect of the law of maintenance is its fragmentary or piecemeal character. When the normal economy of the family breaks down, the victims of the breakdown usually have first recourse, not to the private law of maintenance, but to the public law of social security and the relief available under the national insurance scheme or the supplementary benefits legislation.[9] In practice, therefore, the private obligation of support appears interstitial rather than fundamental. Moreover, the obligation of maintenance in turn presupposes a system of matrimonial property

[4] The phrase is Dicey's: "a husband on marriage became the almost absolute master of his wife's property" (Dicey, *Law and Public Opinion in England*, 2nd ed., 373).

[5] Since the Ministry of Social Security Act 1966 and the replacement of the National Assistance Board by the Supplementary Benefits Commission, the local National Assistance offices are regarded as falling directly under the Ministry in the same way as the local National Insurance and Pensions offices have always done: thus, in 1967 telephone directories both categories of local office are listed under the Ministry of Social Security.

[6] Another example of distortion is the equitable gloss which extended the common law so as to include *loans* for necessaries (*Deare* v. *Soutten* (1869) L.R. 9 Eq. 151; *Weingarten* v. *Engel* [1947] 1 All E.R. 485); its justification in the equitable doctrine of subrogation has been criticised as fallacious, and the gloss rejected, in some American jurisdictions: see 26 *American Jurisprudence*, "Husband and Wife," p. 975 and authorities there cited.

[7] If the direct judicial remedy of a maintenance order had existed when the Married Women's Property Acts 1870–1882 were enacted, perhaps the "self-help" of pledging the husband's credit would have been abolished by those Acts. Instead the right to obtain a maintenance order was not *generally* available until the Summary Jurisdiction Act 1895, although the new technique had existed in certain limited circumstances since the Matrimonial Causes Act 1878, s. 4.

[8] See Brown, "The Offence of Wilful Neglect to Maintain a Wife" (1960) 23 M.L.R. 1.

[9] See Aikin, "Social Insurance and the Family" (1965) J.S.P.T.L. 167.

complementary to itself.[10] But the English law with its extreme and obsolescent solution of complete separation of property is virtually a "non-system," at least so long as the marriage subsists,[11] For the superstructure of case-law built upon the shaky foundation of section 17 of the Married Women's Property Act 1882 [12] can hardly be dignified with the designation of a "matrimonial régime," as that term is understood elsewhere in Europe.[13] Only when the economic breakdown of the family is consequent upon the ultimate catastrophe of death or divorce does English law provide some sort of framework (or régime) within which to regulate the patrimonial relationship of the spouses. In the case of death this framework is found mainly in the legislation governing intestacy and family provision [14]; in the case of divorce it has to be sought in the financial provisions of the Matrimonial Causes Act 1965.[15] Maintenance, therefore, is only part of a larger whole—what Sir Leslie Scarman has termed "the law of family property." [16] But this whole is itself a jigsaw puzzle from which certain key pieces are missing; for example, at common law there is no clear alimentary obligation upon parents in respect of their children [17] nor upon a wife in respect of her husband; nor again (pending implementation of the Russell Committee's proposals) [18] is any right of succession recognised between the father and his illegitimate child. There are also gaps in the law governing rights of property between parent and child *inter vivos*.[19] What we desperately need is a code of

[10] See Kahn-Freund, "Matrimonial Property Law in England" in *Matrimonial Property Law*, edited Friedmann (1955), 287, 301.

[11] Hence the absence of any title "Matrimonial Property" in Halsbury's *Laws of England*. Nor is there any such title or index entry in *Current Law*. Significantly, French authors have asserted that their own contractual régime of complete separation of property is not a régime at all but rather the absence of a matrimonial régime: see Amos and Walton's *Introduction to French Law* (3rd ed. by Lawson, Anton and Brown, 1967), 277.

[12] How shaky is the foundation provided by s. 17 has been shown in *National Provincial Bank* v. *Ainsworth* [1965] A.C. 1175; the legislature has had to underpin the deserted wife's equity by the Matrimonial Homes Act 1967—to the vexation of conveyancers: see Levin, *Law Guardian*, July 1965, Campbell, *ibid.* October 1967, 9.

[13] See generally the relevant contributions in Friedmann, *op. cit.*; also, *Les Régimes Matrimoniaux* (Brussels, 1966) for more up-to-date accounts of the Belgian, Dutch, French and West German régimes.

[14] See Hall, "The Economic Aspects of Death in the Family" (1965) J.S.P.T.L. 188.

[15] Bromley, "The Economic Effects of the Breakdown of Marriage Otherwise than on Death," *ibid.* 198, discusses all forms of marriage breakdown, not merely divorce.

[16] "Law Reform and Family Property" (1966) *The Listener* 683 (a talk broadcast on the B.B.C. Third Programme).

[17] Johnson, *Family Law* (2nd ed. 1965), 259 (citing *Baseley* v. *Forder* (1868) L.R. 3 Q.B. 599); *cf.* Bromley, *Family Law* (3rd ed., 1966), 351 where it is stated that at common law a father is under a duty to maintain his legitimate infant children but this duty is wholly unenforceable (citing *Thomasset* v. *Thomasset* [1894] P. 295 (C.A.)).

[18] See O. M. Stone, "Report of the Committee on the Law of Succession in Relation to Illegitimate Persons" (1967) 30 M.L.R. 552.

[19] Kahn-Freund (1966) J.S.P.T.L. 208.

family law to deal with the patrimonial as well as the personal relationships within the family. One can only hope that the Law Commission will concentrate more of their limited resources upon this urgent task than upon codifying the law of contract, an exercise which by contrast must appear a distracting, and even dangerous irrelevancy.[20]

Thirdly, our family law's besetting sin of multiple jurisdiction, to which reference has already been made above, is peculiarly exemplified in the law of maintenance, where the non-maintained wife may find herself in any of three courts. For a maintenance order simpliciter she may resort to the High Court, a "divorce county court,"[21] or her local magistrates' court. If she seeks maintenance in conjunction with divorce (or judicial separation) she may, if the suit be undefended, now obtain financial provision from the county court.[21] Nor are these jurisdictions mutually exclusive; thus, she may proceed to divorce whilst electing to retain a maintenance order already obtained from magistrates, a course which is encouraged in some measure by the post-1958 procedure for the registration and enforcement of magisterial maintenance orders in the High Court (and vice versa).[22]

If we turn back from procedure to the substantive law, a further defect is its rigid conceptualism. This branch of family law has become a waxworks frozen into certain attitudes and postures. Again we need the touch of the Law Commission's magic wand to break the spell. Thus, the dichotomy of limited maintenance before magistrates and unlimited maintenance in the High Court has become invested with god-given immutability; even the organisation *Justice*, in its evidence to the Departmental Committee of Miss Graham Hall, has recommended the retention of statutory maxima for magisterial maintenance orders and thereby, indirectly, cast its vote to preserve the present distinction.[23] Perhaps the only way out of the impasse is to create new Family Courts.[24] Again, the concept of the right to maintenance being vested exclusively in the mother should be relaxed to allow an independent right to be vested

[20] See Hahlo, "Here Lies the Common Law: Rest in Peace" (1967) 30 M.L.R. 241; also Gower, *ibid.* 259, and Hahlo's further comment, *ibid.* 607. With respect, the writer would endorse Dean Hahlo's chiding of the Law Commission with, in effect, a certain naiveté in their approach to codification generally and that of the law of contract in particular.

[21] Matrimonial Causes Act 1967, s. 2 (1). The Lord Chancellor has stated in the House of Lords that it will not be practicable to bring the Act into operation before April 1, 1968.

[22] Maintenance Orders Act 1958, noted by Kahn-Freund in (1959) 22 M.L.R. 175.

[23] *Justice*, 10th Annual Report (1967), p. 9; see also the earlier report by *Justice*, *Matrimonial Cases and Magistrates' Courts* (1963), which favoured magistrates keeping their matrimonial jurisdiction, although Special Matrimonial Petty Sessional Courts should be constituted for difficult cases.

[24] Brown, "The Legal Background to the Family Court" (1966) *Brit. Journal of Criminology* 189; for influential support of family courts, see Scarman, "Family Law and Law Reform" (A Public Lecture in the University of Bristol, March 18, 1966), 10–11.

in the child [25]; at least, modern statutes have been compelled to admit the right of certain public agencies to sue for the child's maintenance in the mother's stead, so that to this extent the principle has already been breached.[26] Furthermore, the whole relationship of public to private law in this field needs rethinking, and the suggested " fatherless child's allowance " might supply the occasion for such a reappraisal.[27] Or again, the right of spouses to make their own private contracts in matters touching the maintenance of themselves or their children needs to be re-examined in the light of changing social policy.[28]

It is this last factor which was present in the case of *Northrop*,[29] now to be considered. For the underlying issue before the Court of Appeal was the extent to which the private bargain of husband and wife could discharge a father of the obligation to support his children which is laid upon him by statute, the legislature having intervened to fill the lacuna left by the common law.[30] To this problem no complete or final answer was given, but the court did explore a number of important points in the law of maintenance. To accompany the court on this exploration will serve to bring home *in concreto* the defects in this branch of family law.

Consensual Separation and Wilful Neglect

After twenty increasingly unsettled years of married life, the Northrops finally parted by consent in 1964, the wife being left with the two children of the marriage. The husband continued to pay the wife £2 a week for the support of the younger child who was still at school but paid nothing towards the maintenance of the wife herself. After certain abortive efforts towards a reconciliation the wife brought the husband before her local magistrates on a summons under the Matrimonial Proceedings (Magistrates' Courts)

[25] Stone, " Royal Commission on Marriage and Divorce: Family Dependants and their Maintenance " (1956) 19 M.L.R. 601, 618.

[26] Ministry of Social Security Act 1966, ss. 23 and 25; Children Act 1948, s. 23; Children and Young Persons Act 1933, ss. 86–88.

[27] See Margaret Winn, *Fatherless Families* (1964), *passim*, for this suggestion, which is referred to with approval by Cavenagh (1966) J.S.P.T.L. 283 and McGregor (1965) J.S.P.T.L. 206–208; for a fuller development of the idea, see Professor McGregor's address to the National Council for the Unmarried Mother and Her Child, as reported in N.L.J., October 5, 1967, pp. 1047–1048.

[28] The Maintenance Agreements Act 1957 already destroys to some extent the sanctity of the spouses' contracts. Likewise, in a more limited field, *Hyman v. Hyman* [1929] A.C. 601.

[29] [1967] 2 All E.R. 961 (C.A.); [1966] 3 All E.R. 797 (D.C.).

[30] Wilful neglect to provide reasonable maintenance for one's infant child was made a cause of complaint by the Summary Jurisdiction (Married Women) Act 1895, s. 4. But already nearly 300 years earlier the Poor Relief Act 1597 had put upon parents " of sufficient ability " the obligation to maintain their poor children, and in the following century it became the practice for the justices to make maintenance orders against defaulting parents (or other relatives): see Brown, " National Assistance and the Liability to Maintain One's Family " (1955) 18 M.L.R. 110, 113. A criminal sanction for such defaulters was introduced by the Vagrancy Act 1824, s. 3 (now s. 80 of the Ministry of Social Security Act 1966).

Act 1960, alleging desertion and wilful neglect to maintain herself and the younger child. The magistrates dismissed the complaint of desertion because of the consensual nature of the separation, but they found the husband guilty of wilful neglect to maintain his wife and the child and made an order for maintenance at the rate of £5 a week for the wife and £2 a week for the child.

On appeal to the Divisional Court, Sir Jocelyn Simon, P. found two bases on which the magistrates' finding of wilful neglect to maintain the wife could be upheld. In the first place, where, on a consensual parting without any stipulation exonerating the husband from supporting a dependent child, there has been wilful neglect to maintain such a child, the court may make a finding of wilful neglect to maintain the wife. The President found this rule clearly established by such cases as *Kinnane* v. *Kinnane* and *Starkie* v. *Starkie* (*No.* 2), as explained in *Cooke* v. *Cooke*,[31] and the reason for the rule was "the close identification of interest between mother and dependent child; so that a failure to maintain the child throws the obligation onto its mother and amounts to wilful neglect to maintain her, notwithstanding that there is no stipulation to maintain her in the separation agreement."

The President's second way of approaching the problem was to infer such a stipulation for support into the separation agreement. For, where a couple agree to live apart and their family includes a child who needs a mother's personal care to an extent which precludes her from earning sufficient income, "it is a necessary implication that the husband agrees to support, not only the child, but also the wife, in whole or in part, while living in a state of separation (the extent depending on the degree of impairment of the wife's earning capacity by the discharge of her obligations to the child)." As an extreme case the President instances where the child is unweaned.

In the President's succinct judgment the relationship between these two approaches is not made altogether clear.[32] It seems that the President plumped in the end for the second.[33] For had he been content to apply the so-called rule in *Kinnane* v. *Kinnane*, he would not have needed to refer the case back to the magistrates for their further finding of fact as to whether the wife was precluded from supporting herself by her necessary obligations to the child. Certainly Winn L.J. regarded the Divisional Court as having rested their judgment primarily on the basis of the implied term.[34]

[31] *Kinnane* v. *Kinnane* [1953] 2 All E.R. 1144; *Starkie* v. *Starkie* (*No.* 2) [1953] 2 All E.R. 1519; *Cooke* v. *Cooke* [1960] 3 All E.R. 39 (discussed by the writer in (1961) 24 M.L.R. 522). The President referred to his previous approval of the rule in *Young* v. *Young* [1962] 3 All E.R. 120.

[32] In the Court of Appeal Willmer L.J. described the second ground advanced by the President as "entirely different" from the first: [1967] 2 All E.R. at p. 969G.

[33] "it is on this ground that we think that the finding of the magistrates . . . is capable of being sustained" [1966] 3 All E.R. at p. 800F.

[34] [1967] 2 All E.R. at p. 977A.

Of the two approaches the first would still be available even where there was an express stipulation that the wife would in no circumstances look to her husband for support for herself. This is a not uncommon provision in formal separation agreements (see, *e.g.*, *National Assistance Board* v. *Parkes*),[35] and one whose effectiveness to bar the wife's complaint of her own wilful neglect by the husband was upheld by the Divisional Court in *Pinnick* v. *Pinnick*,[36] although it is not effective to prevent the National Assistance Board (now the Supplementary Benefits Commission) bringing its complaint on her behalf,[37] nor to prevent the wife herself alleging wilful neglect of any child of the family.[38] On the other hand, the second approach, based as it is on an implied term, should logically be excluded by such an express exoneration from liability: Winn L.J. criticised the approach precisely on this account. Somewhat strangely, however, Sir Jocelyn Simon went on in his judgment to question whether a husband could exonerate himself in this way " from his primary obligation to support his child or from his consequential obligation to support his wife." As we shall see below, Diplock L.J. in the Court of Appeal seems to assume that he cannot.

In the Court of Appeal the clash between the two approaches, which is latent in the President's judgment, is brought into the open by the division of view between Willmer L.J. on the one hand and the majority (Winn and Diplock L.JJ.) on the other. Willmer L.J. rejects the rule in *Kinnane* v. *Kinnane* but is prepared to accept the alternative route by which the President reaches his conclusion: the majority uphold the rule and apply it.

The Rule in Kinnane v. Kinnane

The " rule " stems from an *obiter dictum* in the judgment of Lord Merriman P., in the last-mentioned case, where he remarked:

> " any sum awarded for the maintenance of the wife, and any sum ordered to be paid to the wife for the support of the children is, as it always has been, an order for the wife. Speaking generally, any of these orders, as I read the code, can only be made if it is established that one of the complaints made by the wife under the code is found to be proved. In other words, I reject the argument that an order cannot be made in favour of the wife for maintenance of the wife unless

[35] [1955] 3 All E.R. 1 (discussed in the writer's article " Separation Agreements and National Assistance " (1956) 19 M.L.R. 628).

[36] [1957] 1 All E.R. 873 (discussed by the writer in (1957) 20 M.L.R. 404).

[37] Previously under s. 43 of the National Assistance Act 1948, but now under s. 23 of the Ministry of Social Security Act 1966; *N. A. B.* v. *Parkes* (cited note 35 above).

[38] *Starkie* v. *Starkie* (*No.* 2) (cited note 31 above). In this case of a consensual separation with no agreement about maintenance, the magistrates had made an order on the ground of wilful neglect to maintain both wife and child in the amounts of 20s. and 30s. respectively; the Divisional Court reduced the order for the wife to a nominal amount but upheld the order for the child.

> it is founded on wilful refusal to provide reasonable maintenance for her or, put the other way, that, if the only legitimate finding is that there has been wilful neglect to provide reasonable maintenance for the infant children whom the husband is legally liable to maintain, no order for maintenance of the wife can be made. I do not think that that is the law." [39]

Willmer L.J. points out that this passage does not support the conclusion drawn from it by Sir Jocelyn Simon, which was (as we have seen above) that " a failure to maintain the child throws the obligation onto its mother and amounts to a wilful neglect to maintain her." The " rule " does not say this but only that, where there has been wilful neglect to maintain the child, the court may make an order that the husband shall pay maintenance not only for the child, but also for the wife. But Willmer L.J. does not, in fact, accept the rule at all. In his view Lord Merriman erred in his proposition that, on proof of any of the offences listed in the code (now section 1 (1) of the Act of 1960), a wife is entitled to any of the orders specified in the code (now section 2 (1) of the Act). It followed that *Starkie* v. *Starkie* (*No.* 2), which adopted the rule, was wrongly decided.[40]

THE RULE IN BAKER *v.* BAKER

If their lordships were divided over the rule in *Kinnane* they were agreed upon the rule in *Baker* v. *Baker*, under which a husband consensually separated from his wife is under no liability to maintain her, unless the agreement to separate is found to be subject to an express or implied term that the husband is to provide maintenance for the wife.[41]

Willmer L.J. agreed with Sir Jocelyn Simon that it may be possible to imply such a term where the family of the separated husband and wife includes a child who needs a mother's personal care to an extent which precludes her from earning sufficient income to support herself; and that it was proper to remit the case to the magistrates to make the necessary findings of fact. But for Willmer L.J. this term is not, as Sir Jocelyn Simon suggested, a *necessary* implication, but only an inference which *may* be drawn, a distinction also made and approved of by Winn L.J.

Winn L.J. was not however attracted to the invocation of an implied term, which he dubbed a legal fiction. " Implied terms are insubstantial foundations for such essential rights," nor were they apt, in his view, to matrimonial relationships, where the parties

[39] [1963] 2 All E.R. at p. 1146.

[40] In so far, presumably, as the Divisional Court in that case allowed an award of maintenance for the wife herself, even in a nominal amount (in addition to an award of maintenance for the child), although the only wilful neglect proved was of the child. See note 38 above.

[41] *Baker* v. *Baker* (1949) 66 T.L.R. (Pt. 1) 81 (fully discussed by the writer at (1956) 19 M.L.R. 628).

do not regard themselves as contracting with each other. They were also subject to the basic objection that they could be expressly excluded. Rather, he would rest the case squarely upon the rule in *Kinnane*, which meant in effect relying upon the words of the statute itself with its direction that the court may order any provision under section 2 (1) upon proof of any complaint under section 1 (1). Nevertheless, and surprisingly in view of these strictures upon the implied term, he agreed that the magistrates should be asked to decide whether or not the husband did impliedly agree to maintain the wife. But if the answer to that question were no, then the court could still proceed to order provision either under paragraph (*b*) or paragraph (*h*) of section 2 (1) on the basis of the proven neglect of the child.[42] And this view is adopted by Diplock L.J. in even plainer terms:

> "If he is guilty of such wilful neglect to provide reasonable maintenance for the child who is living with the wife, there is power in the magistrates to make a matrimonial order. Such order may include provision that the husband shall pay to the wife a weekly sum not exceeding £7 10s. In the statute the weekly sum is not expressed to be for the maintenance of the wife. The only limitation on the power to order such payment is that the sum shall be such 'as the court considers reasonable in all the circumstances of the case.'"

Statutory Interpretation and Legislative History

Although one must have sympathy with Diplock L.J.'s lament that "family rights form a branch of the law into which the courts have introduced esoterism where Parliament intended only simplicity," the interpretation which the majority of the Court of Appeal here put upon the Act of 1960 does, with great respect, seem open to serious legal objection, however desirable the social objective which it achieved. If one traces the historical evolution of the present legislative code, it is quite clear that Parliament has always in past statutes thought in terms of child's maintenance and wife's maintenance. It has been led to do so by the policy (adopted early in the history of the magistrates' matrimonial jurisdiction) of limiting by monetary maxima the sums which the justices could award.[43]

[42] S. 2 (1) provides that on hearing a complaint under s. 1 by either of the parties to the marriage "the court may make an order . . . containing any one or more of the following provisions, namely— . . .

(*b*) a provision that the husband shall pay to the wife such weekly sum not exceeding £7 10s. as the court considers reasonable having regard to their respective means; . . .

(*h*) a provision for the making by the defendant or the complainant or by each of them, for the maintenance of any child of the family, of payments by way of a weekly sum not exceeding in the case of payments by either one of the parties in respect of any one child the sum of 50s."

[43] This policy and its attendant problems in an inflationary era are presently being considered by the Departmental Committee under the chairmanship of Miss Graham Hall to which reference has already been made.

This history begins with the Matrimonial Causes Act 1878, section 4 of which empowered "the court or magistrate" before whom a husband was convicted of an aggravated assault upon his wife to make an order for non-cohabitation and for payment of a weekly sum to the wife. The amount was left in the discretion of the court or magistrate having regard to the respective means of the spouses. The first statutory limit on amount was introduced by the Married Women (Maintenance in Case of Desertion) Act 1886, which set a maximum of £2 to what was clearly regarded as the wife's maintenance, as the title to the Act indicates. The introduction of a statutory maximum may have been due to the fact that this Act, unlike the Act of 1878, was exclusively concerned with the jurisdiction of magistrates; it may also have been prompted by analogy with affiliation proceedings where the bastardy statutes had long been framed by reference to a maximum amount.[44] Likewise the Guardianship of Infants Act 1925, when it extended jurisdiction in guardianship matters to the magistrates' courts, at the same time introduced a limit to the amount of maintenance which magistrates could award.

The Summary Jurisdiction (Married Women) Act 1895, which greatly widened the matrimonial jurisdiction of magistrates, followed the 1886 Act in its provision for maintenance. The weekly sum to be paid to the wife could not exceed £2 and was clearly intended to make over-all financial provision both for her and for any child of which she secured custody. It was not until the Married Women (Maintenance) Act 1920 that Parliament thought fit to earmark a specific sum as maintenance for the child or children; section 1 (1) of this Act is the ancestor of paragraph (*h*) of section 2 (1) of the 1960 Act and refers to payment of a weekly sum not exceeding ten shillings "for the maintenance of each such child." The juxtaposition of wife's maintenance and child's maintenance has ever since remained a feature of the legislative code. Thus, the Departmental Committee on Matrimonial Proceedings in Magistrates' Courts, which drafted the 1960 Act, referred in their Report to paragraph (*b*) of section 2 (1) as fixing the "maximum weekly amount which a husband may be ordered to pay his wife *for her maintenance*," where as paragraph (*h*) "provides *for maintenance for children*."[45] Compare now Diplock L.J.'s comment on paragraph (*b*): "In the statute the weekly sum is not expressed to be for the maintenance of the wife." This may be so. But the wording was taken over from the earlier statutes, which were entitled "Married Women (Maintenance) Acts"; and what the

[44] The Poor Law Amendment Act 1844, s. 8, introduced a limit of 2s. 6d. a week upon the amount which the putative father could be ordered to pay in respect of his illegitimate child; this amended the Poor Law Amendment Act 1834, s. 72, which merely referred to such amount as was "just and reasonable in all the circumstances of the case."

[45] *Report of Departmental Committee on Matrimonial Proceedings in Magistrates' Courts* (Cmnd. 688, 1959), pp. 29–30 (italics supplied).

draftsmen of the present Act intended is clear. Moreover, the internal logic of section 2 (1) requires that the traditional interpretation be retained. For the interpretation now sought to be put upon it makes nonsense of the statutory maxima in the two paragraphs. What becomes of the limit of fifty shillings per child in paragraph (*h*) if the court can always award up to £7 10s. under paragraph (*b*)? The flaw in the reasoning of the majority of the Court of Appeal is shown most clearly if we take a family situation very different from that in *Northrop*, namely, where a wife is left not with one but with four dependent children. Here, if one adopts the view of Winn and Diplock L.JJ., one would be faced, surely, with a contradiction between paragraph (*h*) permitting the justices to award up to £10 and paragraph (*b*) limiting their award to £7 10s.

Where the Court of Appeal went astray was in blurring the distinction between child's maintenance and wife's maintenance (which the statute draws) by the introduction of a hybrid concept, that of mother's maintenance. This is brought out most clearly in a passage from Diplock L.J.'s judgment:

> " The child must be clothed, housed and tended by the wife. This will involve her in direct expense for food and clothing, etc. for the child. It may involve her indirectly in additional expense for more costly accommodation than would be adequate for herself if living alone. It may also involve her in loss of earnings in so far as her ability to undertake paid employment is restricted by the child's need for her personal care. Provision for the husband to pay or to contribute to these expenses of the wife and to recoup her in whole or in part for her lost earnings may be made by ordering payment of a weekly sum under section 2 (1) (*b*) of the Act of 1960. Alternatively, as respects expenses, if the magistrates make an order giving legal custody of the child to the wife, provision for the husband's payment of, or contribution to, these may be made by ordering payment of a weekly sum to the wife under paragraph (*b*) of section 1 (1) of the Act of 1960, or partly under paragraph (*b*) and partly under paragraph (*h*). Since, however, payments made under paragraph (*h*) are for the maintenance of the child, and are held by the wife in a fiduciary capacity to be expended on his maintenance, she can be recouped for her loss of earnings only under paragraph (*b*)."

With great respect, this seems highly esoteric, with its distinctions between expenses (direct and indirect) and loss of earnings. The writer prefers the simpler view of the dissenting member of the Court of Appeal. Willmer L.J. puts it shortly thus:

> " the true effect of the Act of 1960 is that, on proof of one of the offences listed in section 1 (1), a wife is entitled under section 2 (1) to such an order as is relevant to that offence."

And he goes on:

> " If all that she proves, . . . is a wilful neglect to maintain

her child, she is . . . restricted to the remedy provided by paragraph (*h*)."

His lordship reinforces his view by referring to various established limitations upon the contents of matrimonial orders, such as (1) the insertion of non-cohabitation clauses only where needed to protect the wife,[46] or (2) the " bar " which prevents a wife obtaining maintenance for herself where she is guilty of a matrimonial offence.[47] Certainly, this view of the Act accords with the history of the legislative code in question, its traditional interpretation, and the internal logic of section 2 itself. That Willmer L.J.'s dissenting view would produce a socially less desirable result in the instant case is an argument rather for legislative reform,[48] a matter to which we will return below.

An interesting point which was discussed but not decided in the case is whether the husband could have put an end to his duty to maintain the child by an agreement between the wife and himself that she should be solely liable for its support. Diplock L.J. states categorically that the husband could, notwithstanding such an agreement, be found guilty of wilful neglect to maintain the child. Likewise Willmer L.J. did not think that it could be contended that a dependent child's right to be maintained could be affected by any agreement between the parents. Neither of their lordships state, however, the authority for this proposition. Winn L.J. does not advert to the point. Sir Jocelyn Simon, in the Divisional Court, expressly left the point open for further consideration in a case which specifically raised it. Perhaps Willmer L.J. has the solution of this problem in mind when he points out that an order for maintenance of a child under paragraph (*h*) can be made on the authority of section 4 (1) of the Act, even where the wife's only complaint is that of wilful neglect to maintain a child and the court does not find there has been such neglect.[49]

The Law Commission's Proposals

Finally, what bearing have the proposals of the Law Commission in their recent Working Paper upon the problems discussed in this article?[50]

[46] See, *e.g.*, *Jolliffe* v. *Jolliffe* [1965] P. 6.

[47] See, *e.g.*, *Young* v. *Young* [1962] 3 All E.R. 120; *Vaughan* v. *Vaughan* [1968] 2 All E.R. 742.

[48] As his lordship himself observes: " If it be thought that this involves socially undesirable consequences, the remedy lies with Parliament, and should not be the subject of ' judicial legislation ' " (at p. 968H).

[49] " This may seem an odd result," he comments (at p. 966H).

[50] " Matrimonial and Related Proceedings: Financial Relief," Law Commission's Published Working Paper No. 9. The paper is dated April 25, 1967, and therefore antedates the Court of Appeal's decision in *Northrop;* but it cites (at para. 154) Sir Jocelyn Simon's judgment in the Divisional Court for the proposition that maintenance awarded to the wife will in practice take into account the needs of any children in her care.

The version of this paper published on April 25, 1967, concentrates on financial relief in the High Court (and, now, also in the county courts under their new divorce jurisdiction). Maintenance in the magistrates' courts is deferred for full consideration to a later occasion, but some preliminary observations are made in Appendix B concerning the interaction of the proposals in the body of the paper upon the magistrates' jurisdiction. One of the many interesting suggestions in the paper is that, in the High Court, the offence of wilful neglect to maintain a spouse or child should shed the element of wilfulness.[51] Instead, a maintenance order might be made whenever it is proved that " one spouse has failed to provide, or to make a proper contribution towards, reasonable maintenance for the other spouse." The draft clause which the paper puts forward [52] is intended to replace section 22 of the Matrimonial Causes Act 1965, but, unlike that section, it makes no reference to the failure to maintain *a child*. It does however direct the court, in determining whether there has been failure to provide for a spouse, to have regard (*inter alia*) to " the duty of the spouses to care for and bring up any children of the family." The removal of the element of wilfulness would mean, for instance, that a wife could establish failure to maintain even though the husband was unaware of her need (a defence successfully pleaded in *Jones* v. *Jones*) [53]; and to settle any doubts, the draft clause expressly permits an order to be made notwithstanding that the applicant has committed a matrimonial offence or that the husband reasonably believes the applicant to have done so. While therefore such traditional defences as the wife's own adultery or desertion are to go, it is not made clear in the paper what is to happen to the rule in *Baker* v. *Baker*. If the intention was to abolish it, one might have expected it to be listed with the other discarded offences at common law. On the other hand, one could argue that the direction in the clause that " the court shall have regard to all the circumstances of the case and, in particular, to—(a) the conduct of the spouses in relation to each other " could refer to the *Baker* situation of a consensual parting with no agreement for maintenance to continue. Against this it could be said that the abolition of wilfulness carried with it necessarily the repeal of the rule in *Baker*. But equally it could be maintained that, by analogy with the law of tort, the shift of a wrongful act from the wilful category into that of strict liability should not deprive the defendant of the plea of *volenti*, and that the rule in *Baker* amounts in the context of family law to such a plea.

The draft clause relates, as has been mentioned above, only to maintenance applications in the High Court (or county courts). In applications before magistrates Appendix B, with obvious reluctance,

[51] At para. 26. [52] In Appendix A, at pp. 104–106 of the paper.
[53] [1958] 3 All E.R. 410, referred to in para. 28 of the paper and fully discussed by the writer in (1960) 23 M.L.R. 1.

favours the retention of the element of wilfulness along with the general doctrine of the matrimonial offence as the basis for relief.[54] For, without the guide-lines which these specific grounds provide, the magistrates might be left groping. It would seem to follow therefore that the rule in *Baker* would continue to apply before the magistrates.

Where the paper deals with the maintenance of children there is no reference to the possible effect of the rule in *Baker* upon a claim for maintenance of the children.[55] The Law Commission do, however, canvass the view that it should be possible for such a claim to be brought by someone other than the parent or guardian (*e.g.*, a grandparent).[56] From this one may infer that the claim brought by a third party could not be barred merely by some private agreement made between the spouses. In Appendix B there is a similar proposal for widening the class of people having the right to apply for maintenance for children,[57] and the implication again may be that the rule in *Baker* would not apply.

The writer would suggest that *Northrop* v. *Northrop* shows the need for the Law Commission to deal squarely with the rule in *Baker*. As between the spouses there is much to be said for the logic of the common law in making the spouses abide by their bargain,[58] although the burden of proof might be shifted in favour of the applicant (almost always the wife),[59] so that it was for the husband to show that he and his wife parted on the understanding that she would no longer look to him for support. As the law now stands, the applicant must prove that, despite the separation, support was to continue. In relation to children of the family the Law Commission should declare the rule in *Baker* wholly ineffectual, as indeed Diplock and Willmer L.JJ. assume already to be the case. Furthermore, why not (as Dr. Stone has urged)[60] vest in the child itself an independent right to seek a maintenance order, thereby outflanking the rule completely?

The Law Commission should also consider the relationship between the rule in *Baker* and the new policy introduced by the Maintenance Agreements Act 1957 under which the financial arrangements made by spouses, although contractually binding, are capable of variation by the court in certain circumstances.[61] As the law now stands, the statutory power to vary the spouses'

[54] See Appendix B, paras. 9–14.
[55] Paras. 159–181. [56] Para. 168.
[57] At para. 27; the suggestion involves separating the question of maintenance from that of custody, to which it is now tied both in matrimonial and guardianship proceedings in the magistrates' courts.
[58] Subject, however, to a power in the court to vary the bargain where circumstances change: this point is returned to below.
[59] As the magistrates seem to have done in *Browns* v. *Browns* (1968) 107 S.J. 96; but the Divisional Court, allowing the husband's appeal, re-affirmed that the onus remains on the wife.
[60] Stone (1956) 19 M.L.R. 619; (1965) J.S.P.T.L. 206.
[61] The provisions of the 1957 Act are now to be found in ss. 23–25 of the Matrimonial Causes Act 1965.

contract only exists where the agreement is "in writing."[62] Granted the agreement is in writing, then variation is possible both of a maintenance agreement proper and of "a separation agreement which contains no financial arrangements." It is this second type of agreement to which the rule in *Baker* applies. But the statutory power to vary (now set out in section 24 of the Matrimonial Causes Act 1965) can only be exercised in two situations: either (a) "by reason of a change in the circumstances in the light of which any financial arrangements contained in the agreement were made or, as the case may be, financial arrangements were omitted from it," or (b) if "the agreement does not contain proper financial arrangements with respect to any child of the marriage."

If these various stringent provisions be applied to the facts of *Northrop*, it is clear in the first place that the absence of any written agreement between the spouses would have been fatal to any attempt by the wife to seek from the court a variation of the terms on which they parted. But for this, the wife could probably have argued successfully that alternative (b) above applied, inasmuch as the husband was only paying £2 a week in respect of their child and this arrangement could hardly be a "proper" one when he was paying nothing for the support of the child's mother.[63] Certainly, alternative (a) would not have availed the wife, since she could not have pointed to a change in circumstances, at least in the sense in which that term has been narrowly construed by the courts.[64]

Northrop shows therefore that there can be a separation agreement which is caught by the rule in *Baker* but which at the same time, for want of writing, never comes within the ambit of section 24. This gap in the present law seems undesirable and might be bridged by restricting the operation of the rule in *Baker* to agreements in writing. At least this would ensure that any agreement subject to the rule would be capable in appropriate circumstances of judicial variation under the section. Writing might also help ensure a less casual, more wary approach to the terms of the separation. The requirement of writing would, in conjunction with the shift of the burden of proof already proposed above, go far to curtail the mischief of the rule as between the spouses. In relation to children of the family the rule should, as already mentioned, be declared wholly ineffectual.

As well as curtailing the rule in *Baker* in this way the Law Commission might at the same time give further consideration to the principle laid down in *Tulip* v. *Tulip*,[65] with which the rule is

[62] It need not, however, be a formal document; letters will suffice.

[63] The magistrates to whom Mrs. Northrop applied did in fact fix at the same figure of £2 the amount of maintenance to be paid in respect of the child, but it was coupled with an amount of £5 a week for the wife herself; see [1967] 3 All E.R. at p. 965G (*per* Willmer L.J.).

[64] *e.g.*, *K.* v. *K.* [1961] 2 All E.R. 256 (C.A.).

[65] *Tulip* v. *Tulip* [1951] 2 All E.R. 91 (C.A.), where the application for a maintenance order was to the High Court; *cf.* *Dowell* v. *Dowell* [1952] 2 All E.R. 141 (D.C.), where the application was to magistrates. Harman J.

to some extent entangled. Under this principle, the court may make a finding of wilful neglect to provide a wife with reasonable maintenance, despite the husband having fully complied with the terms of a maintenance agreement in her favour, provided the wife proves that she has become in need, that the husband knew of her need and that he then failed to provide additional maintenance.[66] This principle was enthusiastically adopted by Lord Denning in *National Assistance Board* v. *Parkes* [67] where he pronounced the view (*obiter*) that it applied " just as much where there is an agreement to pay nothing as where a fixed sum is to be paid " and that it overrode anything said in *Baker*. But in *Pinnick* v. *Pinnick* [68] the Divisional Court (Lord Merriman P. and Collingwood J.) expressly rejected this attempted extension of the principle in *Tulip* and re-affirmed the rule in *Baker*.

The principle foreshadowed, to some extent, the Maintenance Agreements Act 1957 in undermining the sanctity of the spouses' agreement, and if Lord Denning had got his way for its further extension, it might have rendered otiose that statutory intervention. There is however the obvious and practical distinction that the principle in *Tulip* enables the court to make a maintenance *order* to meet the needs of the non-maintained wife, whereas the statute only empowers the court to vary the terms of the parties' *contract*: the former technique arms the wife with a court order enforceable by all the methods of the Maintenance Orders Act 1958, including attachment of earnings; the latter merely leaves the wife with her remedy in contract. Nevertheless, it is at least debatable whether one needs both techniques to achieve substantially the same result, namely, the adjustment of the burden of support to match the wife's new needs.[69] The case for abolishing the principle in *Tulip* [70] would become stronger if more realistic maxima were fixed for the limits of the magistrates' power to vary agreements under the statute: at present, a spouse may be driven to the expense of seeking variation in the High Court in order to escape from the ceiling of £7 10s. a week (plus £2 10s. a week for each child) upon

dissented in the former case, and his judgment amounts, in effect, to a plea for some new statutory power of variation such as the Act of 1957 was later to provide.

[66] The Law Commission's proposal (discussed above) to remove the element of wilfulness from the offence of neglect to maintain would remove the second of these three requirements.

[67] [1955] 1 All E.R. 700; discussed by the present writer in (1956) 19 M.L.R. 628.

[68] [1957] 1 All E.R. 873; see Brown (1957) 20 M.L.R. 404.

[69] See the striking similarity between the factual situation in *K.* v. *K.* (note 64 above) and that in *Tulip* v. *Tulip*: an increasingly prosperous husband, a wife ever more handicapped by arthritis, and chronic inflation to put up the cost of living.

[70] This would involve specifically providing that it would be a defence to the new offence of " neglect to maintain " if the defendant could show that he had agreed to pay his wife an amount which was sufficient for her maintenance in her then situation and that he had fully complied with such agreement (*cf. N.A.B.* v. *Parkes* [1955] 3 All E.R. at p. 3H, *per* Denning L.J.).

variations in the magistrates' court. Here we await with impatience the report of Miss Graham Hall's committee. Also, as the Law Commission propose,[71] the power to vary should be freed from the excessively restrictive interpretation hitherto put upon it by the courts.

CONCLUSION AND PROPHECY

The Law Commission's proposals, with the addition here suggested, would amount to no more than an overdue tidying up and simplification of the present law. In the longer term a more root and branch reform will be needed. The movement of opinion in favour of the fatherless child's allowance is perhaps a pointer to the direction which this reform will take. The writer believes that the private law of maintenance will tend to wither away and its place be assumed by social security legislation. In other words, by the year 2000 the law will have abandoned as socially undesirable, frequently ineffectual and wholly uneconomic the hounding of spouses through the courts for non-support of their families. Non-support by spouse or parent will be ranged alongside those other vicissitudes of life—unemployment, sickness, industrial injury, child-birth, death itself—for which social insurance should make provision. Before however the complete disappearance of the private obligation, there is likely to be an intermediate stage when we shall revert, in essence, to the system of the Poor Relief Act of 1601: financial relief will be given to those in need by an administrative agency which will then seek to recoup itself in appropriate cases from the defaulting spouse or parent.[72] But complete "socialisation" of the risk of non-support seems eventually certain, as certain indeed in relation to this family liability as is the similar process in many areas of tortious liability. On the other hand, even at the intermediate stage the loss to the wife, as the economically weaker party, of her *personal* right to seek maintenance from her husband will need to be counterbalanced by her being given a *real* right to share in the family property as part of that general reform of our matrimonial property system which the Chairman of the Law Commission has already promised us.[73]

L. NEVILLE BROWN.*

[71] para. 86.

[72] *Cf.* Professor McGregor's advocacy of a radical change of approach: "A wife in need of support should be able to obtain a basic scale of relief by application to some public office (not necessarily the N.A.B.) and this office should have a right to recoup itself against the defaulting husband. All this would be done by administrative process. Only if either spouse were aggrieved at the administrative decisions taken would there be a right of appeal to the courts . . . In short, he would sweep away the matrimonial offence and shift the primary liability for support from the husband to the courts" (see the discussion summarised in (1966) J.S.P.T.L. 206).

[73] Sir Leslie Scarman, "Law Reform and Family Property" (1966) *The Listener* 688.

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VOID OR VOIDABLE?—NATURAL JUSTICE AND UNNATURAL MEANINGS

(Part Two) [66]

V—Collateral Proceedings

Collateral proceedings may take many forms. One of the most obvious varieties is enforcement proceedings, where the person to whom an administrative decision is addressed pleads its irregularity by way of defence in proceedings where he is sued or prosecuted for disregarding the decision.[67]

In *Labalmondière* v. *Frost*, magistrates ordered the defendant to repair his building without first hearing him. On his failure to do so, officials repaired it for him and sued him for the cost, under special statutory provisions. The claim was dismissed, but it was not said whether the original order was void or voidable.[68] In *Smith* v. *R.*, the Crown, acting under statutory powers, forfeited a colonial lease which it had granted and instituted proceedings to recover the land. It was held that " the governor had no jurisdiction to issue the proclamation," in the absence of a prior hearing, and the Crown lost its case.[69]

Similar problems may arise over the enforcement of foreign judgments. Where the defendant has not been notified of proceedings, or has not been given a chance to state his case, English courts will refuse to enforce the foreign judgment; but this is a rule of English public policy, which operates regardless of whether the judgment was void, voidable or unimpeachable under the foreign *lex fori*. Occasionally, however, there may be a statute which *obliges* the courts to enforce foreign judgments, without exception; the only defence which can be raised in such a case is that the judgment is in reality no judgment because void under the foreign

[66] The first part of this article, which dealt with violation of natural justice in the context of direct attack against judicial and administrative decisions, appeared in the previous issue: (1968) 31 M.L.R. 2.

[67] Garnishee proceedings may be included under the rubric of enforcement proceedings, even though they are designed to secure enforcement of a judgment addressed to a person who is not the defendant in the garnishee proceedings. See *Lazard Bros. & Co.* v. *Midland Bank Ltd.* [1933] A.C. 289, 306–307; *supra*, p. 6, note 21. The House of Lords seems to have treated a merely voidable judgment as insufficient to justify garnishee proceedings, but the explanation is probably that the judge in the garnishee proceedings should have set aside the original judgment; besides, the making of a garnishee order is discretionary.

[68] (1859) 1 El. & El. 527. *R.* v. *Totnes Union* (1845) 7 Q.B. 690 is a little similar, but the enforcement sought there was by way of mandamus, which is of course a discretionary remedy.

[69] (1878) 3 App.Cas. 614, 626 (P.C.).

lex fori. Such a situation arose in the Australian case *Posner* v. *Collector for Inter-State Destitute Persons*.[70] A Western Australian maintenance order had been made against the appellant, although he had had no notice of proceedings. The Western Australian statute provided that an indorsement on the summons, recording service, should be evidence of service, and from this the Australian High Court concluded that the Western Australian court had exclusive jurisdiction to determine the fact of service. Since there was evidence, however false, of service, its judgment was merely voidable and, until set aside in Western Australia, was enforceable against the appellant in Victoria.

This case is not contrary to the principle laid down in *Smith* v. *R.*; it is only an exception, based on the special terms of the statute. But English cases involving statutes drafted in similar terms indicate, even though they are not concerned with enforcement proceedings, that the Australian High Court's interpretation was wrong.[71]

Apart from special statutory provisions of the type at issue in *Posner's* case, it seems that breach of the rules of natural justice may be raised as a defence in enforcement proceedings, and that this is probably to be explained on the grounds that breach of these rules is regarded as nullifying the decision. But the cases are too few to justify any definite conclusions. Besides, it is doubtful whether enforcement proceedings are typical of collateral proceedings, or whether they are a fair test of whether a decision is void or voidable. There are many cases in which the courts have treated enforcement proceedings as conferring as wide a power of review as direct proceedings. These cases may be the exception rather than the rule in England,[72] but in the United States it is generally accepted that any defect may be raised as a defence in enforcement proceedings.[73]

Apart from enforcement proceedings, virtually all the natural justice cases on collateral proceedings [74] deal with claims in tort or quasi-contract.

No liability attaches in tort or quasi-contract merely for decid-

[70] (1946) 74 C.L.R. 461.

[71] *Howitt* v. *Howitt*, *R.* v. *Evans*, *R.* v. *Smith*, *R.* v. *Farmer*, *supra*, p. 6, note 22. *Contra*, *Re Lonaghan*, *supra*, p. 11; and in *R.* v. *Farmer* Lord Esher M.R. stated *obiter* that the principle later laid down in *Posner's* case would be applicable in enforcement proceedings: [1892] 1 Q.B. 637, 638–639.

[72] Rubinstein, *Jurisdiction and Illegality*, 1965, pp. 39–40.

[73] K. C. Davis, *Administrative Law Treatise*, s. 28.07; (U.S.) Administrative Procedure Act 1946, s. 10 (b) and (e).

[74] The only exception is *Marsh* v. *Marsh* [1945] A.C. 271 (P.C.). Here, a divorce decree was vitiated by procedural defects unrelated to natural justice; the intervener appealed, and the petitioner died while the appeal was pending. The appeal therefore abated and no judgment was given on appeal. The validity of the divorce later arose as an incidental question during the administration of the petitioner's estate, and it was held that the decree was merely voidable; consequently, never having been reversed on appeal, it must be treated as valid. But the Privy Council's opinion contains a dictum (at p. 284) that breach of natural justice would have rendered the decree void.

ing without jurisdiction."[75] What happens is that the defendant pleads a judicial or administrative decision as a justification for his acts, whereupon the plaintiff seeks to show that the decision is void. According to *The Marshalsea*,[76] a judge who steps outside his jurisdiction (*i.e.*, whose decision is void) is regarded as no longer acting as a judge, so that people executing his decision are trespassers. Definitions of jurisdiction for the purposes of this rule have fluctuated widely; exceptions have been laid down, first by the courts, then by Parliament. It is not hard to see why such inconsistency has arisen. Actions in tort developed before supervisory remedies were well defined, and they were often the citizen's only mode of redress.[77] But the courts also had to think of the interests of officials, who were often unpaid or badly paid, who were frequently lacking in great wealth or knowledge of the law, and who ran the risk of having to pay damages out of their own pocket—for it must be remembered that these rules developed at a time when vicarious liability and insurance against tortious liability were virtually unknown, and when an official could seldom hope for indemnification out of public funds. It is not surprising that the courts arrived at tortuous results in their attempts to reconcile the irreconcilable interests of the citizen and of the public servant.

Many of the cases are actions in trespass arising out of the enforcement of a decision taken without a hearing. Early authorities are in favour of the defendant, usually on the grounds that the tribunal "hath jurisdiction" but "hath erroneously proceeded."[78] But it is now well established that an action lies.[79] Oddly enough, this has never been explained on the grounds that the decision was void; indeed, it is possible to find dicta that the decision was voidable, even in cases where the plaintiff won his action.[80]

[75] Actions alleging a purely economic loss (*infra*, pp. 40–41) are best regarded, however, as an exception to this principle.

[76] (1612) 10 Co.Rep. 68b. See above, p. 2, note 8.

[77] This was particularly true where the defendant was acting in the name of the Crown. The Crown itself could not be sued in tort until 1947, and was seldom subject to control by the prerogative writs, which were generally designed to supervise inferior tribunals (habeas corpus is the obvious exception).

[78] *Webb* v. *Batchelor* (1675) Freem.K.B. 396. See also *R.* v. *Dyer* (1708) 6 Mod. 41; *Goss* v. *Jackson* (1800) 3 Esp. 198. *Webb* v. *Batchelor* and *R.* v. *Dyer* are distinguishable because the defendants were officers of the court; *infra*, p. 141, note 82. In *Goss* v. *Jackson* the action was against the magistrates as well as against the officer of the court; but the judgment, unlike the judgments in the two earlier cases, does not say that the decision was merely voidable. In *Mason* v. *Barker* (*infra*, note 79) an action was successfully brought against a magistrate.

[79] *Painter* v. *Liverpool Oil Gas Light Co.* (1836) 3 Ad. & E. 433; *Mason* v. *Barker* (1848) 1 Car. & K. 100; *Cooper* v. *Wandsworth Board of Works* (1863) 14 C.B.(N.S.) 180; *Hopkins* v. *Smethwick Local Board of Health* (1890) 24 Q.B.D. 713 (C.A.).

[80] Thus in *Cooper's* case it was said that the defendants acted "under the provisions of the statute" but "have exercised their power wrongfully" (*loc. cit.* pp. 189–190, 195–196).

An exception to the general rule of liability exists in the case of court officers, constables and other humble officials, who are not liable for executing judgments given without jurisdiction, unless they had notice of the want or excess of jurisdiction.[81] It is only natural, therefore, that they should not generally be liable for executing a decision given without a hearing[82]; but many cases explain this, unnecessarily, on the grounds that the decision was merely voidable.[83] On the other hand, in *Innes* v. *Wylie*,[84] a constable, who, on the instructions of the officers of a club, restrained a wrongfully expelled member from entering the club's premises, was held liable for assault; and Denman C.J. based his decision on the idea that the plaintiff's expulsion was void because he had been given no opportunity to state his case.

The authorities on the rule *nemo judex in causa sua* are at variance with those on the *audi alteram partem* principle. In *Dr. Bonham's* case,[85] the plaintiff had been imprisoned for refusing to pay a fine imposed by the College of Physicians; half the fine was payable to the King, the other half to the College. It was stated *obiter* that the College had no power under its constituent Charter and Act of Parliament to impose a fine payable to itself (the court, in order to arrive at this result, was even prepared to hold the Act of Parliament void, if need be); consequently, the plaintiff would have succeeded in his action for false imprisonment on this ground, even if the imprisonment had not been illegal for other reasons. In this case absence of interest seems to have been regarded as a condition precedent to jurisdiction, but it is doubtful how far the court intended to lay down a general principle.

More recently, however, it was said in *Dimes* v. *Grand Junction Canal* that breach of the *nemo judex* rule merely rendered the decision voidable, and, until quashed or reversed, "we think that the proceedings were valid, and that persons acting under the authority of the court would not be liable to be treated as trespassers."[86] These dicta were repeated, almost word for word, by the Exchequer Chamber in *Phillips* v. *Eyre*.[87]

It was the practice of the ecclesiastical authorities to enforce their decisions, not by physical acts, but by sequestrating tithes and other debts payable to the defendant. In *Capel* v. *Child*[88] and *Bonaker* v. *Evans*,[89] it was held that a defendant condemned

[81] *Higginson* v. *Morton* (1677) 1 Freem.K.B. 322; *Lacking* v. *Denning* (1705) 1 Salk. 202.

[82] *Webb* v. *Batchelor*, *R.* v. *Dyer*, *Goss* v. *Jackson*, *supra*, note 78; *Painter's* case (*obiter*), *supra*, note 79; *Turley* v. *Daw* (1906) 94 L.T. 216.

[83] *Webb* v. *Batchelor*, *R.* v. *Dyer*, *Turley* v. *Daw*.

[84] (1844) 1 Car. & K. 262.

[85] (1610) 8 Co.Rep. 107. See above, p. 2, note 8.

[86] (1852) 3 H.L.C. 759, 786. If "persons acting under the authority of the court" were taken to mean court officials, the statement would clearly be right, although arguably for the wrong reasons; but it is not obvious that such a restrictive interpretation of the statement is justified.

[87] (1870) L.R. 6 Q.B. 1, 22.

[88] (1832) 2 C. & J. 558.

[89] (1850) 16 Q.B. 162.

without a hearing could bring an action for money had and received; subordinate officers were not exempt from liability; and the judgments seem to be based on the idea that the decision by the ecclesiastical authorities was void if given without a hearing.[90]

Another example of an action for money had and received in *Osgood* v. *Nelson*,[91] where the Registrar of the Sheriffs' Court of the City of London was dismissed from his freehold office. He instituted *quo warranto* proceedings against his successor, but it was subsequently agreed that these proceedings should be delayed while the plaintiff brought a test case for money had and received against his successor. The House of Lords decided against the plaintiff on the facts, but suggested that he would have succeeded if he had shown that he had not had a proper hearing before his dismissal. What is remarkable about the case, however, is that the House of Lords went into all the possible defects in the decision of dismissal, just as if the case had been one of direct rather than collateral attack. This may be explicable on the grounds that the action was a test case for *quo warranto* proceedings pending in respect of a freehold office; at all events, the attitude adopted by the House of Lords made it unnecessary to consider whether lack of a hearing rendered the decision void or voidable.

In *Wildes* v. *Russell*,[92] justices of the peace dismissed their clerk of the peace, who thereupon sued his successor for money had and received, alleging that his dismissal was invalid on the grounds of bias. The Court of Common Pleas, citing *Dimes's* case, held that even if bias existed, it would only make the decision voidable, and therefore, until it had been quashed, it must be treated as valid in collateral proceedings. There are various grounds for distinguishing the case from *Osgood* v. *Nelson* (*e.g.*, that it did not concern a freehold office, that no *quo warranto* proceedings were pending, that a different rule of natural justice was involved), but none of them is wholly convincing. If there *is* a conflict here, obviously *Osgood* v. *Nelson*, as a later decision by a higher court, must prevail. *Osgood* v. *Nelson* may go too far in permitting judicial review, but *Wildes* v. *Russell* does not go far enough.

Where the plaintiff cannot base his claim on trespass or an action for restitution, he is in a quandary. Does an action lie for purely economic loss?[93] As regards breach of the *audi alteram partem*

[90] This is stated in the headnote to *Capel* v. *Child*, but not in the judgment. In *Bonaker* v. *Evans*, the Exchequer Chamber said that the decision was void (at p. 174), but the matter was not discussed carefully.

[91] (1872) L.R. 5 H.L. 636.

[92] (1866) L.R. 1 C.P. 722, 741.

[93] There must probably be a *positive* act (*e.g.*, dismissal) before tortious liability can begin to arise. There is no authority on the question whether a *negative* decision (*e.g.*, not to grant a licence) can be attacked for breach of natural justice, but until recently no action lay against a public authority for *maliciously* refusing to grant a licence (*Bassett* v. *Godschall* (1770) 3 Wils.K.B. 121; *Davis* v. *Bromley* [1908] 1 K.B. 170 (C.A.)—not followed in *David* v. *Abdul Cader* [1963] 1 W.L.R. 834 (P.C.)), although a *malicious positive* decision does create liability (*infra*, notes 94 and 96).

rule, dicta in *Partridge* v. *General Medical Council* [94] indicate that such a claim will succeed, even though the defendants had only carried out an "erroneous exercise" of their functions (*i.e.*, their decision were merely voidable); but, as the functions were "judicial," the plaintiff failed because he could not prove malice.

However, other cases suggest that want of jurisdiction and malice are alternative grounds for an action,[95] and that breach of natural justice is to be regarded as want of jurisdiction for that purpose.[96] But at this point a further difficulty arises. In *Wood* v. *Woad*, the plaintiff was a member of a mutual insurance society and was expelled by the society's committee without a hearing, contrary to the rules of the society. He argued that he had thereby been deprived of insurance money for damage to his ship, and claimed the money in an action for tort against the committee members. Kelly C.B. and Pollock and Amphlett BB. held that his expulsion was void; he was therefore still a member of the society and entitled to his insurance money, so that his declaration disclosed no loss suffered and no cause of action against the committee.[97]

This decision may have been correct on the facts of the case, but it is going too far to suggest that a void act can never cause loss. A generalised application of the rule in *Wood* v. *Woad* could lead to injustice (*e.g.*, in the case of expulsion from a trade union which successfully operates a closed-shop policy), and the authorities are divided as to the exact scope to be attributed to the rule.[98]

The law concerning tortious liability for purely economic loss is clearly in a fluid condition. But the uncertainty is by no means confined to cases of economic loss. As regards breach of the *audi alteram partem* principle, most of the cases are in favour of liability, and the only difficulty arises over questions of purely economic

[94] (1890) 25 Q.B.D. 90, 96–97 (C.A.).

[95] *Ackersley* v. *Parkinson* (1815) 3 M. & S. 411, 427. In *Roncarelli* v. *Duplessis* (1959) 16 D.L.R. (2d) 689, which, like *Ackersley's* case, was not concerned with natural justice, the Canadian Supreme Court held that a tort action lies for economic loss caused by administrative acts without legal justification. The *ratio* is unclear; there was evidence of malice, and the court hardly discussed whether the decision was void or voidable (*infra*, note 96). Moreover, the facts arose in Quebec, a civil law jurisdiction; so *quaere* whether the case would be authority in common law jurisdictions.

[96] *Beaurain* v. *Scott* (1813) 3 Camp. 388 and *McGillivray* v. *Kimber* (1916) 26 D.L.R. 164, 170–178, 182, 184 (*audi alteram partem*); *Thompson* v. *British Medical Association* [1924] A.C. 764, 780 (P.C.) (*obiter—nemo judex in causa sua*). *McGillivray* v. *Kimber* is the only case on which any great reliance can be placed.

[97] (1874) L.R. 9 Ex. 190. Cleasby and Pollock BB. also held that the declaration disclosed no cause of action because it contained no allegation of bad faith. See the discussion in *Ridge* v. *Baldwin* [1964] A.C. 40, 80, 88–92, 136 as to the true *ratio* of *Wood* v. *Woad*. Cleasby and Amphlett BB. doubted whether an action would lie in any circumstances, but this is clearly not the *ratio*.

[98] Rubinstein, *op. cit.* pp. 128–133. Maybe the defendant is estopped from alleging the nullity of his own act—*Roncarelli* v. *Duplessis* (1959) 16 D.L.R. (2d) 689, 708, *per* Rand J.

loss. On the other hand, liability is not so certain in the event of breach of the rule *nemo judex in causa sua*, particularly if the decision is a judgment of one of the "ordinary" courts, as in *Dimes's* case. Moreover, even those authorities which are in favour of liability do not always explain it on the grounds of the nullity of the decision in dispute.

The confusion in natural justice cases is merely symptomatic of the confusion surrounding the whole subject of the tortious liability of public officers. The question whether or not a defect in a decision goes to jurisdiction seldom receives a clear answer. Even if it did, the law would still be unsatisfactory for an even more cogent reason; limitation of liability to jurisdictional defects does not go far enough to protect the citizen, while it goes too far in deterring the fearless discharge of official duties. Governmental functions, by their very nature, involve a greater risk of infringing individuals' rights than commercial operations do. And, since governmental powers are created in the interests of the community, and not (we hope) in the interests of the administrator, it is only fair to make public funds, instead of individual officers, liable for the loss caused by defects in the administrative machinery.

This is the system adopted in France. Loss caused by defects in the administration is remedied by an action for damages for *faute de service*, brought against the state, local authority or other administrative organ concerned. Individual liability of the official for *faute personnelle* is not altogether excluded (there may even be cases where *faute de service* and *faute personnelle* overlap, so that the official and the administration are regarded, so to speak, as joint tortfeasors); but individual liability is rare.[1] In particular, the administration is liable for adopting and enforcing illegal administrative decisions, *whether they be void or voidable*,[2] while the individual official is, as a rule, not liable.[3] French law may result in complexities of its own, but at least it makes it unnecessary to determine whether a decision is void or voidable—a question which has caused English courts endless difficulties[4]; and, as usual, French law gives greater protection to the citizen than English law, and interferes less with sound administration.

VI—Waiver

Having completed our surveys of direct and collateral attack, we must turn to certain problems common to both forms of attack. The

[1] Hence Dicey's strictures against French administrative law. For an account of modern French law on the subject, see M. Waline, *Droit Administratif* (9th ed., 1963), pp. 785–911.

[2] *Ibid.* at p. 548.

[3] *Ibid.* at p. 796.

[4] Reform of English law along the lines suggested would also make it possible to repeal the special statutory exemptions from liability, such as the Constables' Protection Act 1750 and the Justices' Protection Act 1848, which at present do so much to complicate the law on the subject.

main problem here is that of waiver.[4] "If a litigant has himself induced, acquiesced in or waived the irregularity he cannot afterwards complain of it."[5] It is often thought that the possibility of waiving a defect proves that that defect does not go to jurisdiction; and, although it will be shown later that this view cannot be accepted without reservations, waiver cases do have a certain relevance to the question whether breach of natural justice renders a decision void or voidable.

A large number of certiorari and prohibition cases hold that an applicant cannot attack a decision for bias if he knew of the bias during the original proceedings and failed to take reasonable steps to object to the composition of the tribunal. In most of these cases nothing was said about the decision being void or voidable.[6] But sometimes the courts admit the possibility of waiver while stating that bias or interest renders the decision void.[7]

Properly understood, there is nothing startling in these judgments. Certiorari and prohibition are discretionary remedies,[8] and in the exercise of their discretion the courts have for centuries withheld certiorari and prohibition when the applicants have waived defects, including defects of a jurisdictional nature,[9] in the inferior tribunals in question. The ambit of this principle is not altogether clear—the courts make an imprecise distinction between a *total want* of jurisdiction, which cannot be waived, and *contingent defects*

[4] Most of the waiver cases deal with direct attack, but for examples of collateral attack, see *Corrigal's* case (*infra*, p. 48, note 15), *Lucking* v. *Denning* (*infra*, p. 148 note 28), *Truscott* v. *Carpenter* (*infra*, p. 148 note 29), *Maltby* v. *Murrells* (*infra*, p. 148, note 30), *R.* v. *Commissioner of Valuation* and *R.* v. *Berry* (*infra*, p. 149, note 32), and *Kindersley's* case (*infra*, p. 150, note 38).

[5] *Marsh* v. *Marsh* [1945] A.C. 271, 285 (P.C.). For examples of acts amounting to waiver, see the cases mentioned below in notes 6, 7, 12, 14 and 30.

[6] *R.* v. *Richmond JJ.* (1860) 24 J.P. 422; *Ex p. Ilchester Parish* (1861) 25 J.P. 56; *R.* v. *Kent JJ.* (1880) 44 J.P. 298; *R.* v. *Cumberland JJ.* (1892) 52 J.P. 502; *R.* v. *Byles, ex p. Holtidge* (1912) 77 J.P. 40; *R.* v. *Williams* [1914] 1 K.B. 608; *R.* v. *Clare County JJ.* [1918] 2 I.R. 116; *R.* v. *Essex JJ., ex p. Perkins* [1927] 2 K.B. 475.

[7] *Serjeant* v. *Dale* (1877) 2 Q.B.D. 558; *R.* v. *Williams* [1914] 1 K.B. 608 (statutory disqualification). *Cf. Ex p. Medwin* (1853) 1 E. & B. 609, 614, 617 (interest "incapacitates" the judge); and for the significance of the no certiorari clause in *R.* v. *Cheltenham Commissioners*, see above, p. 14, note 62.

[8] Prohibition is not discretionary if the want of jurisdiction is apparent on the face of the record—a well-established but illogical rule; consequently no waiver is possible in such a situation (*Farquharson* v. *Morgan* [1894] 1 Q.B. 552 (C.A.); *Alderson* v. *Palliser* [1901] 2 K.B. 833 (C.A.)). In *R.* v. *Williams* [1914] 1 K.B. 608, the Divisional Court suggested that even if the applicant were entitled to certiorari *ex debito justitiae*, he would be estopped from alleging a disqualifying interest on the part of the magistrates, after failing to object when the case was before the magistrates' court; but this suggestion is exceptional.

[9] *Cox* v. *St. Albans* (1672) 1 Mod. 81; *Nendick* v. *Stait* (1678) 3 Keb. 849, 854; *Lucking* v. *Denning* (1705) 1 Salk. 202; *Anon.* (1707) 11 Mod. 192; *R.* v. *Salop JJ.* (1859) 2 E. & E. 386; *Mayor and Aldermen of the City of London* v. *Cox* (1867) L.R. 2 H.L. 239, 283 (but see p. 268, disapproving of *Anon.* (1707) 11 Mod. 192); *R.* v. *Comptroller-General of Patents and Designs, ex p. Parks, Davis & Co. Ltd.* [1963] 2 W.L.R. 760, 764.

of jurisdiction, which can [10]—but it is certainly applicable to the rule *nemo judex in causa sua*.[11]

So we shall have to look beyond certiorari and prohibition cases if we want to reach any general conclusions about waiver. In cases which were not concerned with applications for certiorari and prohibition, waiver of bias and interest has been permitted without any discussion as to whether such defects went to jurisdiction.[12] Similarly, in *de Verteuil* v. *Knaggs*, the Privy Council suggested *obiter* that it would be unnecessary to give a hearing to a party affected by an impending decision if there were "obstructive conduct on the part of the person affected"; the action was for a declaration, but nothing was said about lack of notice rendering the decision void or voidable.[13]

More often, waiver of the rules of natural justice is permitted on the grounds that breach of those rules does not go to jurisdiction. Thus, in *Fry* v. *Moore*, the court had allowed substituted service to take place in circumstances where it was impermissible. After judgment by default had been entered, the defendant took out a summons, asking for the judgment to be set aside and for the plaintiff to be ordered to deliver a statement of claim. The Court of Appeal held that the order for substituted service was not a nullity, but a mere irregularity, which had been waived by the summons asking for delivery of a statement of claim; the defendant had thereby recognised that valid proceedings had been instituted.[14]

[10] De Smith, *op. cit.* pp. 314–315. *Cf.* Gordon, "The Observance of Law as a Condition of Jurisdiction" (1931) 47 L.Q.R. 557, 574: "All these terms are misuse of language. Jurisdiction must be an absolute conception; so jurisdiction cannot be defective. . . . For it must exist in all perfection, or not at all; a relative want of jurisdiction is nonsense." Similarly, phrases such as "total absence of jurisdiction" are, like "absolutely void," no more than a mournful monument to linguistic decay; for what can be more absent than absence? But the fact that the courts have expressed themselves unhappily does not altogether detract from the soundness of their conclusions. There is nothing irrational in saying that acquiescence will operate as a bar to obtaining certiorari or prohibition in some circumstances, but not in others.

[11] The point is made clearly in *R.* v. *Williams*, *supra*, p. 145, note 7.

[12] *R.* v. *Sheppard* (1778) 1 Leach C.C. 101 (partly statutory disqualification). In *Tolputt* v. *Mole* [1911] 1 K.B. 836, the plaintiff sued a county court registrar in his own court and lost; the registrar taxed the costs which he had been awarded against the plaintiff. The plaintiff appealed against the taxation to the county court judge, to the Divisional Court and finally to the Court of Appeal. It would seem that the plaintiff did not invoke the principle *nemo judex in causa sua* until the case reached the Court of Appeal, which held that it was too late for him to do so. (The facts of the case are, however, not entirely clear; see the exchange of remarks between Fletcher Moulton L.J and the plaintiff's counsel on p. 838.)

[13] [1918] A.C. 557, 561; and see de Smith, *op. cit.* p. 121. If a statute provides for substituted service, then evasion of service justifies substituted service, but not no service at all: *R.* v. *London County Quarter Sessions Appeals Committee, ex p. Rossi* [1956] 1 Q.B. 682, 698 (*obiter*). For the common law on this point, see *R.* v. *Dyer* (1708) 6 Mod. 41; *R.* v. *Cotton* (1783) 2 Barn.K.B. 241, 261, 282; *R.* v. *Clement* (1821) 4 B. & Ald. 218, 231.

[14] (1889) 23 Q.B.D. 395; and see above, p. 6, note 21. Ord. LXX, r. 2 (now Ord. 2, r. 3), of the R.S.C. provided that "no application to set aside any proceeding for irregularity shall be allowed . . . if the party applying has

Similarly, in *Wakefield Local Board of Health* v. *West Riding & Grimsby Ry.*, it was held that a statutory disqualification, declaratory of the common law principle *nemo judex in causa sua*, could be waived, because the statute did not intend the disqualification to go to jurisdiction.[15]

There is, indeed, a common belief that a defect cannot be waived if it goes to jurisdiction, since jurisdiction cannot be conferred by consent or acquiescence. For instance, the parties cannot by consent empower a civil court to hear a criminal case, or vice versa. As a general rule, the subject-matter over which a tribunal has jurisdiction cannot be extended by the parties.[16]

But the fact that jurisdiction cannot be extended in one direction by consent does not necessarily mean that consent cannot extend jurisdiction in other directions. Many requirements have to be fulfilled before a tribunal has jurisdiction, and there is no logical reason why consent should not be able to cure absence of some of those requirements, even though it cannot cure absence of others. Apart from certiorari and prohibition cases,[17] there is no direct authority for the view that violation of the rules of natural justice goes to jurisdiction but may nevertheless be open to waiver. However, the possibility of such a thing happening may be shown by examining circumstances where consent, acquiescence, waiver or estoppel [18] have been held to cure other jurisdictional defects. It may be difficult to find a comprehensive formula for distinguishing these circumstances from cases where jurisdiction cannot be extended by consent [19]; but a legal principle does not cease to be sound simply because there is no adequate terminology to describe it.

An outstanding example of a situation where consent can cure want of jurisdiction is to be found in the rules concerning service

taken any fresh step after knowledge of the irregularity." This rule only applies to irregularities, not to nullities: *Hamp-Adams* v. *Hall* [1911] 2 K.B. 942, 943 (C.A.).

15 (1865) L.R. 1 Q.B. 85. See also *Corrigal* v. *London & Blackwall Ry.* (1843) 5 Man. & G. 219, 247.

16 *Farquharson* v. *Morgan* [1894] 1 Q.B. 552 (C.A.); *Toronto Ry.* v. *Toronto Corp.* [1904] A.C. 809, 815 (P.C.).

17 *Supra*, p. 145, note 7. These authorities do cast an interesting light on cases not involving certiorari and prohibition, where breach of the rules of natural justice has been held to be capable of waiver, for, if such breach goes to jurisdiction in certiorari and prohibition cases, why should it not do the same in other cases? *Cf.* the remarks in *R.* v. *Williams* (*supra*, p. 145, note 8) about estoppel ousting remedies that are normally available *ex debito justitiae*. In *R.* v. *Cheltenham Commissioners* there are dicta that disqualifying interest in the Queen's Bench could be waived in the same way as it could in inferior tribunals; interest in inferior tribunals was by implication treated as going to jurisdiction, since the court's power of review was not ousted by a no certiorari clause (*supra*, p. 28, note 62); would interest in the Queen's Bench have the same effect, while still being capable of waiver?

18 The notions merge into one another in the present context, but, for reasons which will appear later, it is better to treat the cases as laying down a rule of consent which validates the decision *erga omnes*; estoppel, on the other hand, would only operate as a personal bar.

19 See above, p. 148, note 10.

of writs abroad. Apart from certain exceptions in the Rules of the Supreme Court, it is axiomatic that English courts have no jurisdiction over actions *in personam* unless the writ has been served on the defendant in England. But the defendant may appoint an agent to accept service on his behalf in England [20]; and, even if the writ is served abroad, the defendant is precluded from objecting to the jurisdiction if he has entered an appearance without protest.[21] In corresponding circumstances, too, entry of appearance in a foreign court constitutes submission to the jurisdiction,[22] unless solely for the purposes of contesting jurisdiction.[23] Express agreement can also confer jurisdiction on English [24] or foreign [25] courts.

Geographical limitations on the jurisdiction of inferior courts can also be removed by acquiescence, at least as regards the place of service of writs.[26] The same would seem to be true of limitations based on the defendant's place of residence; the relevant cases are prohibition cases, but suggest that the question does not turn solely on the discretionary nature of prohibition.[27] In *Lucking* v. *Denning*, Lord Holt said that if a cause of action arose outside the area over which an inferior tribunal had jurisdiction, and if the defendant raised no objection during proceedings before the inferior tribunal, then he would be estopped from alleging want of jurisdiction thereafter.[28] A good deal was said about withholding prohibition, but Lord Holt does not seem to have confined his reasoning to the availability of prohibition; the action was in tort and earlier cases make the same point without mentioning prohibition.[29]

Rules concerning the time within which actions must be instituted, or within which decisions must be taken, can also usually be waived, even when they are regarded as going to jurisdiction.[30]

[20] *John Russell & Co. Ltd.* v. *Cayser, Irvine & Co. Ltd.* [1916] 2 A.C. 298, 302–303 (*per* Lord Haldane).

[21] *Forbes* v. *Smith* (1855) 10 Exch. 717; *Boyle* v. *Sacker* (1888) 39 Ch.D. 249 (C.A.).

[22] *Molony* v. *Gibbons* (1810) 2 Camp. 502; *Guiard* v. *de Clement* [1914] 3 K.B. 145.

[23] *Tallack* v. *Tallack* [1927] P. 211; *Re Dulles' Settlement* [1951] Ch. 842 (C.A.); distinguishing *Harris* v. *Taylor* [1915] 2 K.B. 580 (C.A.).

[24] R.S.C., Ord. 10, r. 8; Ord. 11, r. 2.

[25] *Feyerick* v. *Hubbard* (1902) 71 L.J.K.B. 509; *Copin* v. *Adamson* (1875) 1 Ex.D. 17; extended to implied agreements in *Blohn* v. *Desser* [1962] 2 Q.B. 116.

[26] *Oulton* v. *Radcliffe* (1874) L.R. 9 C.P. 189 (Palatinate Court at Lancaster—writ served outside Lancashire).

[27] *Donegal* v. *Donegal* (1821) 3 Phillim. 597; *Re Jones* v. *James* (1850) 19 L.J.Q.B. 257, 258; *Moore* v. *Gamges* (1890) 25 Q.B.D. 244.

[28] (1705) 1 Salk. 202. Lord Holt also said that the defendant might be estopped from pleading that he was not one of the class of persons over whom the inferior tribunal had jurisdiction. But see above, p. 2, note 8.

[29] *Anon.* (1673) 1 Vent. 286; *Truscott* v. *Carpenter* (1697) 1 Ld.Raym. 229; notes to *Stannian* v. *Davis* (1704) 1 Salk. 404.

[30] *Maltby* v. *Murrells* (1859) 5 H. & N. 813, 820–821, 823–824. See also *Tyerman* v. *Smith* (1856) 6 E. & B. 719 and *Ringland* v. *Lowndes* (1864) 17 C.B.(N.S.) 514; note that in these two cases the time could have been extended by written agreement, according to the statute, but the court also allowed

On the other hand, uncertainty surrounds rules about the form in which court proceedings should be instituted; violation of such rules is treated as vitiating jurisdiction, and cannot be waived in criminal cases,[31] although waiver is probably possible in civil cases, despite the jurisdictional nature of these rules.[32]

De lege ferenda, a nullity should be capable of waiver where the rule violated was laid down in the interests of the parties, but not where it was laid down in the interests of public policy. As yet, the law is too confused to be summed up in such a general principle, but enough has been said to show that the fact that a defect goes to jurisdiction does not necessarily mean that the defect cannot be waived. Conversely, a defect which merely renders a decision voidable cannot be cured by consent if the rule violated was established in the interests of public policy; the " open court " rule is a clear example of this principle.[33]

Consequently, the fact that the rules of natural justice can be waived does not automatically prove that breach of those rules does not go to jurisdiction. Express statements in waiver cases about the question whether violation of natural justice renders a decision void, or voidable, are few and contradictory. But this does not matter; it is clear that the rules of natural justice can be waived, and it is submitted that the question of waiver and the question of nullity are mutually irrelevant.

VII—AN ASPECT OF LOCUS STANDI

It is suggested that the views on waiver outlined above provide a key to an obscure but worrying problem of *locus standi*. The problem may be simply stated: may a decision be impugned, on the grounds of breach of natural justice, only by the party who was the victim of that breach, or may other parties also challenge the decision on this ground? For instance, suppose that a court, in spite of not hearing the defendant, or in spite of its apparent bias against him, decides in his favour. May the plaintiff (or, in collateral proceedings, a third party) attack the decision on the grounds of breach of natural justice?

extension by estoppel. *Cf. London Ballast Co. Ltd.* v. *Buckinghamshire County Council* (1966) 65 L.G.R. 227.

[31] *Grimble* v. *Preston* [1914] 1 K.B. 270 (D.C.) (by inference) and *Morgan* v. *Edwards* (1880) 5 H. & N. 415. *Cf. R.* v. *Dennis* [1924] 1 K.B. 867, 869 (C.C.A.) (prisoners charged on separate indictments but tried together).

[32] *Park Gate Iron Co. Ltd.* v. *Coates* (1870) L.R. 5 C.P. 634; *R.* v. *Berry* (1859) Bell C.C. 46. *Cf. R.* v. *Commissioner of Valuation* [1901] 2 I.R. 215, 230–231 (Irish C.A.) (rating officer revalued property *proprio motu* instead of acting on ratepayer's application). *Contra*, *Hamp-Adams* v. *Hall*, *supra*, p. 146, note 14 (distinguishable as turning on the wording of the R.S.C.); *Alderson* v *Palliser* [1901] 2 K.B. 888 (C.A.) (prohibition—want of jurisdiction apparent on face of record). *Whiffen* v. *Malling JJ.* [1892] 1 Q.B. 362, 367, 370 contains conflicting dicta.

[33] *MacPherson* v. *MacPherson* [1936] A.C. 177 (P.C.). *Cf. Stone* v. *Stone* [1949] P. 165 (C.A.).

The general view is that breach of natural justice may be invoked only by the party who is the victim of that breach,[34] and that it is only possible to reach this result by holding that the decision is voidable, not void.[35] But this underestimates judicial ingenuity. For instance, it is said that the adult party is bound by a contract declared " absolutely void " by the Infants Relief Act 1874, since the Act was intended to relieve infants, not adults.[36]

Such ingenuity may be criticised as sacrificing logic to justice. But there can be cogent logical reasons for holding that breach of the rules of natural justice, even if it renders the decision void, can only be invoked by the party who is victim of that breach. First, no one may claim a benefit by invoking his own wrongful act[37]; secondly, no one may question the validity of a decision from which he has actually derived a benefit.[38]

These two arguments only provide a solution in a limited range of cases. But a comprehensive solution can be found with the help of the principles concerning waiver. Waiver amounts to consent, which cures all defects caused by violation of natural justice, even if those defects go to jurisdiction. Once the injured party has waived his objections to the decision, retroactively if necessary, neither he nor anyone else can invoke any defects in the decision, because those defects *no longer exist*. The decision is neither void nor voidable; it is unimpeachable. It is consequently unnecessary to discuss whether the decision would have been void or voidable in the absence of consent by the injured party.

VIII—Conclusions

There is no simple answer to the question whether violation of natural justice renders a decision void or voidable. Breach of the *nemo judex* rule is perhaps less likely to go to jurisdiction than breach of the *audi alteram partem* principle. But this conclusion rests largely on *Dimes* v. *Grand Junction Canal* [39] and a few other cases decided shortly thereafter, which have been accorded exaggerated attention by subsequent commentators, and which are not always easy to reconcile with more modern cases going the other way.

[34] *Contra*, by inference, *Corrigal* v. *London & Blackwall Ry.* (1848) 5 Man. & G. 219, 247; but this case can be distinguished as dealing with a statutory disqualification.

[35] *e.g.*, Lord Devlin in *Ridge* v. *Baldwin* [1964] A.C. 40, 189. In *Durayappah* v. *Fernando* [1967] 2 All E.R. 152 (P.C.), it was held that the decision should be treated as void if challenged by the aggrieved party, but as voidable if challenged by a third party.

[36] See also *Boddington* v. *Wisson* [1951] 1 K.B. 606 (C.A.).

[37] This idea underlies the remarks of Rand J. in *Roncarelli* v. *Duplessis*, *supra*, p. 143, note 98. See also *R.* v. *Swansea Harbour Trustees* (1839) 8 A. & E. 439; but this is a certiorari case, and the court may simply have been exercising its discretion.

[38] *Banque des Marchands de Moscou* (*Koupetschesky*) v. *Kindersley* [1951] Ch. 112 (C.A.).

[39] (1852) 3 H.L.C. 759.

It is necessary to look at different contexts; a decision may be void for some purposes but voidable for others.[40] Some people may object that this is attributing a very unnatural meaning to the words "void" and "voidable," but English courts have never allowed the tyranny of words to stand in the way of doing justice. The very fact that a void decision may be appealed against shows that the nullity theory has not been pushed to its logical conclusion.[41] Often the courts openly manipulate the concepts of "void" and "voidable" in order to protect the citizen. Thus, a *conviction* made in violation of the rules of natural justice will be quashed as void,[42] notwithstanding the existence of a "no certiorari" clause[43]; but a similar violation renders an *acquittal* merely voidable.[44]

Apart from "no certiorari" and similar clauses, and acquittals in criminal proceedings, the distinction between void and voidable decisions does not affect the possibilities of direct attack against a decision. Orthodox theory teaches that declaration and prohibition only lie against void decisions, and the courts readily grant those remedies for violation of natural justice, and seem to regard such violation as rendering the decision void (as they do in most cases of direct attack, apart from acquittals by biased magistrates and biased decisions by superior courts). But even in the case of declaration and prohibition they do not seem to treat the nullity of the decision as a condition precedent to the availability of the action; which suggests that the limitations placed on the scope of those remedies by orthodox theory are beginning to break down.

Similarly, waiver cases and the associated problems of *locus standi* are explicable in terms of consent, in such a way that it is unnecessary to ask whether or not violation of natural justice goes to jurisdiction.

The biggest problem remains in relation to collateral proceedings. The law here is very confused. More often than not, the courts have allowed decisions to be challenged for breach of natural justice in collateral proceedings; and this practice has been explained (or ought to have been explained, according to traditional principles) on the grounds that the decision was void. But there

[40] Similarly a man may be in possession of a chattel for some purposes but not for others: *cf.* B. W. M. Dias, *Jurisprudence* (2nd ed., 1964), Chap. 12.

[41] *Supra*, p. 9, note 36. *Cf. Kestell* v. *Langmaid* [1950] 1 K.B. 233.

[42] *Supra*, p. 5.

[43] *Ibid.*

[44] *Supra*, p. 5. The small number of cases on acquittal shows that the point is not of great practical importance; likewise, "no certiorari" and similar clauses have been dropped from modern statutes in favour of more effective ways of excluding judicial review.

For another example of the flexibility of the concepts of "void" and "voidable," see *R.* v. *Farmer*, *supra*, p. 130, note 71. *Cf. Pease* v. *Chaytor* (1868) 3 B. & S. 620, 640–644, where Blackburn J. suggests that an erroneous finding of jurisdictional facts by a magistrate does not go to jurisdiction in collateral actions in tort, but may go to jurisdiction in cases of direct attack.

is too much conflict among the cases to enable any firm conclusions to be drawn.

Even if the confusion could be removed, the law on collateral proceedings would still be unsatisfactory. In actions for tort or restitution, the court's sympathies are torn between the plaintiff citizen and the defendant official; and the principles uneasily established in such cases tend to govern the courts' attitudes in other forms of collateral proceedings also. No progress is possible until individual liability in tort of public officers is replaced by liability falling upon the corporate public authority, with public funds at its disposal. Once this has been achieved, there will be comparatively little obstacle to extending the citizen's rights by enabling him to challenge *any* defect in an administrative decision during *any* form of collateral proceedings (not merely actions in tort); the distinction between jurisdictional and non-jurisdictional defects will be swept away.[45]

At the moment, a decision vitiated by breach of natural justice may be void for some purposes and voidable for others; but for most purposes the distinction between void and voidable decisions is irrelevant. It will become even more irrelevant if the law on collateral proceedings is reformed along the lines indicated.

It will certainly be a good thing if practical problems no longer turn on the distinction between void and voidable decisions—a distinction which has been used with conspicuous lack of clarity by the judges. Many of the inconsistencies are caused by a desire to do justice in differing cases, but others are due only to the judges' misunderstanding of conceptual sophistries of their own devising.[46] An appreciation that a decision may be void for some purposes, but voidable for others, may clear away some old confusions, but it runs the risk of introducing new ones; for it forces words into unnatural meanings, and undermines certainty by multiplying the possibility of distinguishing earlier authorities.

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[45] In French law (which has inspired the proposed reforms in the law of tort outlined above) the illegality (not merely the nullity) of an administrative act may be pleaded in all types of collateral proceedings (Waline, *op. cit.*, *supra*, n. 99, at pp. 62–69, 548–546).

[46] It is the same combination of factors which has confused the law on possession: Dias, *op. cit. supra*, p. 150, note 40.

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SOME LEGAL PROBLEMS OF INTERNATIONAL WATERWAYS, WITH PARTICULAR REFERENCE TO THE STRAITS OF TIRAN AND THE SUEZ CANAL

THE fact that the recent " six-day war " in the Middle East began with an attempt to close the Straits of Tiran and ended with those Straits re-opened to shipping, but the Suez Canal closed for the second time in eleven years, has drawn attention once again to the law affecting international waterways. Because the problem is less well known, this article will concentrate for the most part on the Straits of Tiran. A few remarks will, however, be made about the Suez Canal towards the end of the article.

INTERNATIONAL WATERWAYS—GENERAL REMARKS

What is an international waterway? The question is not easy to answer. According to the leading authority,

> " For purposes of analysis, international waterways must be considered to be those rivers, canals, and straits which are used to a substantial extent by the commercial shipping or warships belonging to States other than the riparian nation or nations. . . . The international character of a waterway, thus conceived, rests upon factual considerations, for it is only by examination of the actualities of international usage that any conclusions about the requisites of international character become possible." [1]

Nevertheless, the term " international waterway " appears to be one to which the British Government attaches significance. Speaking in the General Assembly of the United Nations on March 4, 1957, the British delegate stated:

> " It is the view of Her Majesty's Government in the United Kingdom that the Straits of Tiran must be regarded as an international waterway through which the vessels of all nations have a right of passage." [2]

This view was endorsed by the Prime Minister, during the recent Arab-Israeli crisis, when he told the House of Commons on May 31 that " the Gulf of Aqaba is an international waterway and that the Straits of Tiran do provide an international waterway into which and through which the vessels of all nations have a right of passage." [3]

[1] R. R. Baxter, *The Law of International Waterways* (1964), p. 3.
[2] 667th Plenary Meetings, p. 1284.
[3] H.C.Deb., Vol. 747, No. 200, cols. 205–206.

The starting point for any consideration of this branch of the international law of the sea must be the conventions adopted at the Geneva Conference on the Law of the Sea 1958—particularly the Convention on the Territorial Sea and the Contiguous Zone and the Convention on the High Seas.[4] Behind these conventions lay not less than seven years' preparatory work by the International Law Commission, during which the views of governments were repeatedly taken into account and culminating in seventy-three draft articles prepared by the Commission in the summer of 1956 [5]; a protracted debate in the Sixth Committee of the General Assembly of the United Nations in the autumn of 1956; and certain further preparatory work conducted by or on behalf of the Secretariat of the United Nations during the period 1956–58.[6]

As part of the preparatory work just referred to, the Secretariat of the United Nations requested Commander R. H. Kennedy, O.B.E., R.N. (Retd.) to undertake two studies. The first, Preparatory Document No. 6, was "A Brief Geographical and Hydrographical Study of Straits which constitute Routes for International Traffic." [7] The second, Preparatory Document No. 12, was "A Brief Geographical and Hydrographical Study of Bays and Estuaries, the Coasts of which belong to Different States." [8] The Secretariat itself also prepared, as Preparatory Document No. 11, a "Guide to Instruments affecting the Legal Status of Straits." [9] These studies are invaluable to an elucidation of the problems now to be considered.

Generally speaking, the Geneva codification of 1958 eschewed unnecessary definitions. The following key provisions must, however, be noted.

From the Convention on the Territorial Sea and the Contiguous Zone

Article 1

1. The sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea.

[4] Cmnd. 584. The other two conventions, dealing respectively with Fishing and Conservation of the Living Resources of the High Seas, and the Continental Shelf, are not immediately relevant. All four conventions are now in force.

[5] "Report of the International Law Commission covering the Work of its Eighth Session." *General Assembly Official Records: Eleventh Session.* Supplement No. 9 (A/3159).

[6] See the article by the present writer, "The Preparation of the 1958 Geneva Conference on the Law of the Sea" (1959) 8 I.C.L.Q. 122.

[7] A/Conf. 13/6.

[8] A/Conf. 13/15.

[9] A/Conf. 13/14. Attention should also be drawn to two other studies, namely, Preparatory Document No. 1, "Memorandum concerning Historic Bays," prepared by the Secretariat itself (A/Conf. 13/1), and Preparatory Document No. 15, a paper on "Certain Legal Aspects concerning the Delimitation of the Territorial Waters of Archipelagos," prepared at the request of the Secretariat by Mr. Jens Evensen, Advocate at the Supreme Court of Norway.

Article 2

The sovereignty of a coastal State extends to the air space over the territorial sea as well as to its bed and subsoil.

Article 5

1. Waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.

Articles 3 and 4 laid down technical rules concerning the drawing of base lines. It is these base lines which separate " internal waters " from " territorial sea." The legal difference is that, whereas a coastal state is entitled to exclude foreign shipping from its internal waters,[10] it must afford to such shipping a right of innocent passage through its territorial sea.

Article 7 was a lengthy article concerning bays. It defined a bay as " a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast." It also provided that " if the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters "; and further that " where the distance between the low-water marks of the natural entrance points of a bay exceeds twenty-four miles, a straight base line of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length." However, Article 7 related " only to bays the coasts of which belong to a single State "; whilst its provisions were not to apply to " historic bays " [11] or to bays where, for the reasons given in Article 4, a " straight baseline system " along an entire coast, as opposed to closing lines across the mouths of individual bays, was envisaged. The implication of this was presumably that (i) where there is a bay the coasts of which belong to more than one state, a closing

[10] Save for one exception provided for in Art. 5 (2).

[11] No agreed list of " historic bays " has ever been drawn up, although a fairly clear example is Conception Bay in Newfoundland. See *Direct U.S. Cable Co.* v. *Anglo-American Telegraph Co.* (1877) 2 App. Cas. 394. An example—and possibly the only example—of a " historic bay " the coasts of which belong to more than one state is the Gulf of Fonseca. In a judgment given on March 9, 1917, in a case brought by El Salvador against Nicaragua, the Central American Court of Justice held that the Gulf of Fonseca was " an historic bay possessed of the characteristics of a closed sea " and that El Salvador, Honduras and Nicaragua were co-owners of its waters, except as to the littoral marine league which was the exclusive property of each (*American Journal of International Law*, 11 (1917), p. 698). With regard to " historic bays " it may be pointed out that, at a time when three miles was generally considered the maximum breadth of the territorial sea and six miles (or at the most 10) as the permissible length of closing lines across bays, the notion of a " historic bay " as a special category exempted from any restriction as to the length of the closing line was considerably more important that it now is if the 24 mile closing lines allowed by Art. 7 of the Geneva Convention are to become the general rule. The International Law Commission had recommended a maximum closing line of 15 miles.

line may not be drawn at all, except in the case of a "historic bay"; and (ii) in the case of "historic bays," whether the coasts of such bays belong to one or more states, the closing line is not restricted to twenty-four miles.

Articles 14 to 23 wrestled with the difficult problem of innocent passage. Although these articles bravely attempted to define both "innocent" and "passage," it cannot be said that any unambiguous conclusion emerges as to what constitutes an "innocent passage." If the coastal state and the state of the vessel concerned differ as to whether a particular passage is innocent or not, belated reference to international adjudication is always possible, if both sides agree. But clearly this is one of the most difficult issues in international law today, quite apart from the problem which arises if one or more of the states involved is, or claims to be, at war. If the coastal state is at war, it enjoys "belligerent rights" under which it may take certain steps against its enemy's ships, as well as neutral ships carrying cargoes to or from enemy ports.[12] These rights may be exercised even on the high seas; *a fortiori* they may also be exercised in the coastal state's own territorial sea. If, on the other hand, the coastal state is neutral, it may close its territorial sea to belligerent warships and their prizes, but it is not bound to do so.

The following further points need to be made on the Convention on the Territorial Sea and the Contiguous Zone.

(i) The convention is completely silent on the breadth of the territorial sea. An attempt was made to remedy this defect at a second conference held in Geneva in 1960, but this too failed.[13] On this critical point all that the International Law Commission had been able to say was that "international law does not permit an extension of the territorial sea beyond twelve miles" and that "the Commission, without taking any decision as to the breadth of the territorial sea up to that limit, notes, on the one hand, that many states have fixed a breadth greater than three miles and, on the other hand, that many states do not recognise such a breadth when that of their own territorial sea is less." It remains broadly true that a claim to more than twelve miles has no hope of meeting with general acceptance. A considerable number of claims up to twelve miles are put forward, but except where a claim can be justified on historic grounds (*e.g.*, Norway's claim to four miles) the states favouring three miles decline to accept such claims.

(ii) The convention has no general article on the question of straits. This is remarkable considering the attention devoted to

[12] This statement is made on the assumption that, despite the Charter of the United Nations, it is still possible for states to be engaged in "war" and to enjoy "belligerent rights." This assumption is doubtful, but that question is too large to be discussed here.

[13] D. W. Bowett, "The Second United Nations Conference on the Law of the Sea" (1960) 9 I.C.L.Q. 415.

straits in the literature of international law. Article 16 (4) does, however, provide the following:

> "There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State." [14]

There can be no doubt that the Conference had the Straits of Tiran very much in mind when it adopted this provision and that its adoption was sufficient to explain the refusal of the Arab states to sign the convention.

According to the leading authority mentioned above, "in geographic terms, a strait is normally a narrow passage connecting two sections of the high seas." [15] Legally, the régime of a strait is affected by its breadth, in particular by the fact whether or not passage through it is possible without passing through the territorial waters of one or other of the littoral states. Thus, on the assumption that the maximum breadth of territorial waters is three miles, no special régime will in principle be required if a strait is more than six miles wide.[16] Indeed, it may be asked why, even in the case of a narrow strait, a special régime is necessary seeing that the waters in such a strait are territorial waters and that there is an undoubted right of innocent passage through such waters. The idea of a special régime for straits seems first to have arisen through the claim of littoral states to regard some straits that were more than six miles wide as territorial." Now, however, the question is seen more from the opposite point of view, namely, the right of warships of non-littoral states to pass through narrow straits. Thus, in the *Corfu Channel* case, the International Court of Justice affirmed that "States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorisation of a coastal State, provided that the passage is *innocent*." [17] The Court evaded in that case the question whether there is a similar right for foreign warships to pass through the territorial sea as such, even where there is no strait. Hence the importance in certain circumstances of determining whether there is a strait or not.

There was bitter controversy at the Geneva Conference of 1958 on the question whether warships have a right to pass through the territorial sea. On that question Professor Sorensen comments:

> "The actual text of the Convention would . . . warrant the conclusion that warships have the same right in this respect

[14] Art. 16 (4) follows immediately after Art. 16 (3) which permits a coastal state in certain circumstances to suspend "temporarily in specified areas of its territorial sea the innocent passage of foreign ships." Such suspension, however, must be "without discrimination amongst foreign ships."

[15] Baxter, *op. cit.*, p. 8.

[16] Of course it is not as simple as that. Navigational considerations may make it necessary to keep close to one or other shore.

[17] *I.C.J. Reports 1949*, p. 4 at p. 28. Italics in original.

as other ships, but the proceedings of the Conference leave no room for doubt that this was not the intention of the majority of delegations." [18]

Because of this uncertainty it may, as already stated, be important to decide whether a particular stretch of water is a strait or not. In talking of a special régime for straits, however, it is necessary to guard against a further confusion. Some straits have been subjected to a " special régime " in the sense of a régime actually laid down by treaty. But there are very few of these. Indeed the Secretariat's Guide, referred to above (Preparatory Document No. 11), mentions only five. These are (a) the Straits of the Dardanelles, the Sea of Marmora and the Bosphorus; (b) the Straits of Gibraltar; (c) Fuca's Straits; (d) the Straits of Magellan; and (e) the Danish Straits. The special régime—such as it is—envisaged by the International Court of Justice in the *Corfu Channel* case depends solely upon factual considerations, namely, that the straits in question are " used for international navigation between two parts of the high seas."

From the Convention on the High Seas

Article 1 defines the high seas as " all parts of the sea that are not included in the territorial sea or in the internal waters of a State." Article 2 mentions " freedom of navigation " as one of the freedoms of the high seas.

During the course of the discussions at the Geneva Conference the Israeli delegate in the Second Committee (which was dealing with the régime of the high seas) advanced certain general criticisms of the manner in which the International Law Commission had approached its task. The Commission, he felt, had maintained an unduly rigid distinction between the régime of the territorial sea and that of the high seas. Its draft articles " should be redrafted or regrouped so as to include both innocent passage and passage on the high seas within the framework of freedom of navigation." To over-emphasise the distinction between the territorial sea and the high seas was to assume that

" when a ship sailed from one port to another it crossed an invisible frontier, some miles from the shore, beyond which freedom of navigation existed. In actual fact, however, a ship

[18] *Law of the Sea* (International Conciliation, No. 520, November 1958), p. 285. This curious result arose in this way. The International Law Commission had proposed that coastal states might require notification of the passage of warships or even make it subject to previous authorisation. In the First Committee of the Geneva Conference the I.L.C. draft was adopted, but in plenary the Western Powers succeeded in securing the deletion of the requirement of prior *authorisation*. A number of delegations were not content with prior *notification* only, and the entire article was lost. As Arts. 14 to 17 (the general articles concerned with the right of innocent passage) appear under a subsection entitled " Rules applicable to All Ships," it is argued that warships enjoy exactly the same rights as merchant ships.

passing through the territorial sea enjoyed the right of innocent passage, which was independent of the sovereignty of the coastal state and which formed an integral part of freedom of navigation. The fact that passage through the territorial sea might be subject to qualifications did not alter the basic fact that innocent passage was exercised as a right, and not on sufferance; suspension of such passage within the territorial sea could not be arbitrary, even as a state could not arbitrarily interfere with freedom of navigation on the high seas. Moreover, qualifications of the right of innocent passage did not always exist, as in the case of international straits and bays and free access to ports."

Rather, in the Israeli delegate's view, one should lay stress on " the concept of the unity of the voyage." [19]

THE STRAITS OF TIRAN AND THE GULF OF AQABA

The description that follows is taken from the Secretariat Study of " Bays and Estuaries, the Coasts of Which belong to Different States " referred to above.[20]

> " The Gulf of Aqaba is a long narrow gulf on the eastern side of the Sinai Peninsula. The western shore is Egyptian,[21] the eastern shore is Saudi Arabian and the head of the Gulf is Israeli and Jordanian territory. The islands of Tiran and Sinafar front the entrance. The length of the gulf is about ninety-six miles."

The Study goes on to explain that the breadth of the Gulf at the entrance is five and three-quarter miles; that at its widest part the Gulf is fourteen and a half miles wide but that further up the average breadth is between eight and a half and eleven miles; and that the Gulf narrows to between three and four miles wide towards the head. There are two feasible passages. One of these is the Enterprise Passage, 1,800 yards wide, between the Sinai coast and a

[19] Official Records of the Second Committee (A/Conf. 13/40), Twelfth Meeting, paragraphs 5–8. Similar views were expressed by the Netherlands delegate when he said: " The right to use the high seas for purposes of navigation had legal consequences that went beyond the concept of the high seas in the geographical sense of the term. No purpose would be served by proclaiming freedom of navigation on the high seas if that freedom could be enjoyed only in the geographical area of the high seas to the exclusion of territorial and internal waters. The ' freedom of navigation ' concept should imply the right of ships of all flags to engage in international trade, because in principle it covered the right to carry goods and passengers between various ports throughout the world." (Fourth Meeting, para. 10.)

[20] p. 154, *supra*. The description of the Straits of Tiran and the Gulf of Aqaba is a combined description appearing in this Study (*i.e.*, Preparatory Document No. 12). The Study covers no fewer than 48 such bays and estuaries, including Lough Carlingford and Lough Foyle. In the other Study (Preparatory Document No. 6), devoted to " Straits which constitute Routes for International Traffic," 88 straits are described.

[21] At the time of writing Israel is in possession of the Sinai Peninsula. At this time, however, her rights and duties are those of a military occupant, not a sovereign.

line of drying coral reefs. The other is the Grafton Passage, 950 yards wide, between these reefs and Tiran island.

The legal position of Tiran and Sinafar is obscure. It appears that Egypt occupied these islands in 1950 with Saudi Arabian consent. The Egyptian delegate informed the Security Council on February 15, 1954, that the two islands had constituted Egyptian territory since 1906. But in a memorandum attached to a letter dated April 12, 1957, from the Permanent Representative of Saudi Arabia to the United Nations to the Secretary-General, it was stated that " these two islands are Saudi Arabian "; and Egypt apparently raised no objection.[22]

Having regard to the width of the Gulf, and having regard also to the dispute over the breadth of territorial waters, it is not clear whether there are any high seas inside the Straits of Tiran. Obviously, if international law imposes a maximum breadth of three miles for the territorial sea, quite a considerable part of the Gulf of Aqaba constitutes high seas. If, on the other hand, international law accepts as valid claims to a territorial sea of twelve miles, as formulated by the Arab states and many others, then no part of the Gulf of Aqaba constitutes " high seas," and the status of the Straits of Tiran is affected too, since it can no longer be said of those Straits that they " connect two sections of the high seas." In that eventuality, on whatever theory any right to enter the Gulf of Aqaba—and in particular to reach the Israeli port of Eilath—may rest, it can no longer rest on the proposition that the " Straits of Tiran " are a strait in the sense of " a narrow passage connecting two sections of the high seas."

It may be necessary to draw a distinction between merely entering the Gulf of Aqaba on the one hand and navigating as far as Eilath—or for that matter the Jordanian port of Aqaba—on the other hand. If, for example, the Gulf of Aqaba constitutes " high seas," then there would be no reason why a foreign warship, enjoying its right of innocent passage through the Straits of Tiran under the *Corfu Channel* decision, should not enter the Gulf and stay for some time therein on a surveillance mission, without ever intending to reach Eilath or Aqaba. If, on the other hand, there are no high seas within the Gulf, then a mission of that kind would seem to be excluded, but it would not necessarily follow that a foreign merchant ship would not be entitled to pass through the Straits of Tiran, sail up the Gulf, and dock at Eilath or Aqaba despite any objection by the main littoral states, Egypt and Saudi Arabia.

Leaving aside the problem of defining " innocence," Article 14 of the Geneva Convention on the Territorial Sea and the Contiguous Zone states that " Passage means navigation through the territorial

[22] See C. B. Selak, " A Consideration of the Legal Status of the Gulf of Aqaba," *American Journal of International Law*, 52 (1958), p. 660; and also L. Gross, " The Geneva Conference on the Law of the Sea and the Right of Innocent Passage through the Gulf of Aqaba," *ibid.* 53 (1959), p. 564.

sea for the purpose either of traversing that sea without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters." Vessels bound to or from Eilath could therefore be said to be exercising the right of passage not merely through the Straits of Tiran but also through the Egyptian and/or Saudi Arabian portions of the Gulf of Aqaba. Under the general rules of international law these states would be entitled to regulate such shipping, and possibly on occasions to suspend it temporarily, although the fact has to be faced that Israel will always tend to regard any such suspension as a threat to her security warranting an armed response in self-defence. But it is difficult to see how under general international law Egypt and Saudi Arabia could claim any permanent right to exclude such shipping altogether.

That the Arab claim to exclude ships bound to and from Eilath is weak under general international law is no more convincingly evidenced than by the heavy reliance placed on such other Arab claims as that Israel has no right to exist as a state or that the Arab states are at war with Israel.[23] Moreover, if the Arab claim were good under general international law, there might be serious repercussion upon the right of navigation in other areas where international boundaries converge, such as the Shatt Al Arab, the Gulf of Trieste and the Rio de la Plata, to mention only a few.

It may be as well also to comment upon the Israeli contention that the principle of the freedom of the seas implies in itself the right to navigate to and from the Israeli port of Eilath. This contention sounds plausible because it is certainly true that, for Israel, the freedom of the seas would be a much diminished prize if navigation were excluded from the Gulf of Aqaba. Nevertheless, it is doubtful if one principle of international law, the freedom of the seas, is of itself sufficient to generate rights that are entitled to take precedence over rights enjoyed under another principle of international law, in this case the principle of the territorial sovereignty of the intervening coastal states. This question of freedom of the seas versus territorial sovereignty was much discussed at Geneva in 1958 in relation to the problem of landlocked states. On that question Article 8 of the Convention on the High Seas asserted that "States having no sea coast should have free access to the sea." But, even in the case of landlocked states, such access was made dependent upon agreements with the intervening coastal states. Whatever geographical disadvantages she may suffer from in the Gulf of Aqaba, Israel has a Mediterranean coast as well. She cannot therefore claim any special privilege as a landlocked

[23] There is a certain inconsistency between the refusal of the Arab states to recognise Israel and their claim to be at war with Israel nonetheless. The inconsistency is, however, not absolute because international law admits of the possibility of belligerent communities not recognised as states (*e.g.*, the Confederacy in the American Civil War).

state. In practice, Israel must like all other states take her geographical position as she finds it. She is entitled to the benefits of the general rules of international law, no more and no less. So far as Israel's rights in the Gulf of Aqaba are concerned, these rules are the rules relating to bays, straits and passage through the territorial sea which it has been attempted to elucidate above.

There is one other question relating to the Gulf of Aqaba which needs to be considered. This is whether the littoral states, acting in agreement, are entitled to close the Gulf to foreign shipping. The question is of course academic since the littoral states are not likely to agree on such a course, Israel in particular being determined to keep the Gulf open. Nevertheless it is necessary to consider this matter as part of the general Arab contention that the Gulf of Aqaba is an " Arab Sea " on which Israel, even if it is entitled to exist at all, has no right to maintain a presence.[24]

As already indicated, Article 7 of the Geneva Convention on the Territorial Sea and the Contiguous Zone suggests that a closing line—which has the effect of turning the waters inside it into internal waters from which foreign shipping may be totally excluded—may not be drawn at all across the mouth of a bay the coasts of which belong to more than one state, unless the bay is an " historic bay." It is doubtful, however, if this restriction would apply in the case of a bay with as narrow an entrance as the Gulf of Aqaba. On any conceivable view of the breadth of territorial waters, the Gulf of Aqaba, if it belonged to a single state, could be closed. In principle, then, it would seem that the littoral states of the Gulf of Aqaba, provided they are all acting in agreement, can do what any one of them could do if it controlled the whole area—that is, close the Gulf to foreign shipping.

This being so, it is scarcely necessary to consider the Arab claim that the Gulf of Aqaba is an " historic bay." The claim rests on the long period of Arab domination of the area between 700 and 1517 and on its control by the Ottoman Empire between 1517 and 1917. But the essence of any claim on historical grounds is lack of interruption, and the sequence of events since 1917 has been too chequered to permit of the continued recognition of any historic right. (To mention only a few of these events, the Treaty of San Remo of April 25, 1920, awarded to Great Britain a Mandate for Palestine, which then included Transjordan. In 1922 a separate Mandate was created for Transjordan, which was placed under the Amir Abdullah. In 1924 Abdullah's father, King Husayn of the Hejaz, was forced to abdicate by the King of Nejd, Ibn Saud, who

[24] This particular Arab contention appears to be that, although Eilath was in the mandated territory of Palestine and although Eilath was also in the area awarded to the Jewish State under the United Nations Partition Plan of 1947, the Israeli occupation of Eilath was illegal because it took place on March 11, 1949, after the Israeli-Egyptian Armistice Agreement (February 24, 1949) though before the signature of the Israeli-Jordan Armistice Agreement (April 8, 1949).

in 1926 incorporated the Hejaz into his dominions, forming the present Kingdom of Saudi Arabia in 1932. As for Egypt, having been a vassal state of Turkey, she became a protectorate of Great Britain in 1914. Her independence was recognised in 1922 by Great Britain, whilst in 1923 Turkey by the Treaty of Lausanne renounced all her rights and titles over Egypt as from November 5, 1914.)

THE SUEZ CANAL [25]

Apart from the familiar contention that Israel has no right to exist, Egypt's claim to close the Suez Canal at all times to Israeli ships and cargoes destined to Israel, and from time to time to ships of all nations, rests essentially on the thesis that Egypt is at war with Israel and is entitled to take these measures in self-defence. Article I of the Constantinople Convention of October 29, 1888, respecting the Free Navigation of the Suez Maritime Canal states that " The Suez Maritime Canal shall always be free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag." Obviously this principle could not always be carried out in so bold a form, and in fact Articles IV, V, VII and VIII impose certain restrictions upon maritime belligerent Powers. Article X, however, states that " the provisions of Articles IV, V, VII and VIII shall not interfere with the measures which His Majesty the Sultan and His Highness the Khedive,[26] in the name of His Imperial Majesty, and within the limits of the Firmans granted, might find it necessary to take for securing by their own forces the defence of Egypt and the maintenance of public order." Article X also provided that " It is likewise understood that the provisions of the four Articles aforesaid shall in no case occasion any obstacle to the measures which the Imperial Ottoman Government may think it necessary to take in order to insure by its own forces *the defence of its other possessions situated on the eastern coast of the Red Sea.*" From the passage in italics it seems possible to deduce that the Constantinople Convention, although primarily concerned with the Suez Canal, might have some bearing upon the Gulf of Aqaba problem as well.

On April 24, 1957, Egypt made a Declaration, deposited with

[25] The reader is referred to the following: L. Gross, " Passage through the Suez Canal of Israel-Bound Cargo and Israel Ships," *American Journal of International Law*, 51 (1957), p. 530; " The Suez Canal," A Selection of Documents relating to the International Status of the Suez Canal and the Position of the Suez Canal Company, November 30, 1854–July 26, 1956, published under the auspices of the Society of Comparative Legislation and International Law (London, Stevens, 1956) and to " The Suez Canal Settlement," A Selection of Documents relating to the Settlement of the Suez Canal Dispute, the Clearance of the Suez Canal and the Settlement of Disputes between the United Kingdom, France and the United Arab Republic, October 1956–March 1959, published under the auspices of the British Institute of International and Comparative Law (London, Stevens, 1960).

[26] In 1888 Egypt was a vassal state of the Ottoman Empire, although under military occupation by Great Britain.

the United Nations, in which she undertook " to respect the terms and the spirit of the Constantinople Convention of 1888 and the rights and obligations arising therefrom." She further undertook that " differences arising between the parties to the said convention in respect of the interpretation or the applicability of its provisions, if not otherwise resolved, will be referred to the International Court of Justice." A Declaration in furtherance of this obligation was made on July 18, 1957. The possibility therefore exists of bringing before the International Court of Justice at least some of the legal issues arising from the present closing of the Suez Canal. The right to seize the Court is, however, carefully limited in the Egyptian Declarations to the parties to the Constantinople Convention and further to states who have made declarations under Article 36 (2) of the Statute of the International Court of Justice (*i.e.*, the Optional Clause). The parties to the Constantinople Convention were Great Britain, Germany, Austria, Hungary, Spain, France, Italy, Netherlands, Russia and the Ottoman Empire. Of these, the following only have made declarations under Article 36 (2): Great Britain, France, Netherlands, Turkey.

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TWO WORKS OF KARL LLEWELLYN—II

II. The Cheyenne Way

The second part of this article is devoted to an analysis of selected features of *The Cheyenne Way*, which Llewellyn wrote in collaboration with an anthropologist, E. Adamson Hoebel. After a brief account of the genesis of the work, two aspects are here selected for detailed consideration: the "theory of investigation" on which the research was based; and the "law-jobs theory," which was in part stimulated by the project; finally, a brief attempt will be made to place the work in the context of Llewellyn's intellectual development.

The Genesis of the Work [1]

Llewellyn had been interested in ethnology even before he took up the study of law. While he was an undergraduate at Yale College (1911–15) he had been greatly impressed by the writings of William Graham Sumner. Afterwards he continued to read in the area. A somewhat dilettante interest in "primitive law" was transformed into active involvement in 1933 when at the request of the Columbia anthropologist Franz Boas, Llewellyn undertook to supervise the work of Hoebel, who was then a graduate student. Hoebel was faced with a problem. He wished to embark on a study of the legal life of the Comanche Indians, but more experienced anthropologists had expressed scepticism about the viability of the project, mainly on the ground that the Comanches had no "law." At that time the study of "primitive law" was itself at a rudimentary stage of development. The predominating method was what Llewellyn and Hoebel later named "the ideological approach"; the typical field technique consisted of interviewing informants and asking questions of the type: "What is your rule about . . .?" "What is the result when . . .?" or "What would happen if . . .?" Quite apart from the general limitations and pitfalls of this technique, it is particularly ineffective in dealing with peoples who are inarticulate about their institutions, as the Comanches and other plains Indians tended to be. In 1949 Dr. Ralph Linton, a leading authority on the Comanches was to remark:

> "Different cultures show a tremendous amount of difference in the degree to which their patterns are consciously formalised. My experiences with Polynesians and Comanches illustrate this: Polynesians can give you practically an Emily Post statement of what proper behavior should be on all occasions,

[1] The following account is based partly on material found in the Llewellyn papers at the University of Chicago, partly on an interview with Professor Hoebel and partly on Hoebel's article "Karl Llewellyn—Anthropological Jurisprude" (1964) 18 Rutgers L.Rev. 785.

> whereas Comanches, when asked how they do anything immediately answer, 'Well, that depends.' They genuinely think of behavior as a range of unlimited, individual, freedom of choice, although when you take a series of examples of behavior . . . you find actually quite a high degree of uniformity." [2]

Thus, apart from the definitional question whether "primitive law" was "law properly so called," there was a practical methodological problem of ascertaining what were the customary norms, if any, of a people like the Comanches.

Hoebel presented this problem to Llewellyn at their first meeting in June 1933; Llewellyn immediately outlined the methods he would use in investigating the legal processes of an American Indian tribe. As he talked he made notes. Hoebel left the interview with the notes which, he claims, provided the basis of his field method during the ensuing years. This method, an adaptation of the case method, will be considered in detail below. Llewellyn became Hoebel's supervisor for his doctoral thesis, which Hoebel successfully completed in 1934,[3] thereby confounding the sceptics. In 1935, after a less successful project among the Shoshones,[4] Hoebel suggested that the "law-ways" of the Cheyenne Indians might be a fruitful field for study. The Cheyennes had for more than a century led an adventurous nomadic existence on the Great Plains west of the Mississippi River; the main reason for choosing them was that they were known to have had developed institutions with coercive power vested in an organised body, which suggested that their ways of dispute-settlement and of preserving order might have been more institutionalised than was the case with the Shoshones. Hoebel started field-work among the Northern Cheyennes in the summer of 1935 and towards the end of that summer Llewellyn, accompanied by his economist wife, Emma Corstvet, joined him at Lame Deer in Montana for ten days. This was Llewellyn's first field-work among American Indians, and the only period he spent among the Cheyennes. This fact is indicative of the fairly clear division of the labour involved in the production of *The Cheyenne Way*. Hoebel did nearly all the field-work and collection of data and wrote the first draft of the middle section of the book, which is primarily descriptive. Llewellyn invented and subsequently developed the theory of investigation which guided in large part the collection and interpretation of data. He was also primarily responsible for the general theoretical and jurisprudential matrix.

Inter-disciplinary matchmakers might learn something about the conditions of successful collaboration from this unique example

[2] Cited by Hoebel *The Law of Primitive Man* (1954) p. 40.
[3] Ultimately published *sub nom.*: *The Political Organisation and Law-Ways of the Comanche Indians*. Memoirs of the American Anthropological Association, No. 54 (1940).
[4] See Hoebel in *American Anthropologist* (1935) 37, pp. 320–351; *ibid.* (1939) 41, pp. 440–457; and *op. cit.*, note 3, Appendix A, pp. 135–142.

of a marriage between law and anthropology which lasted until the death of one of the partners.[5] The success was due in part to common, in part to complementary, characteristics. Both men were interested in jurisprudential questions and this provided an identity of objectives, the absence of which is the first obstacle to this type of collaboration. Both favoured the closer integration of the social sciences. Temperamentally they were well suited: each had a touch of the poet that enabled him to achieve almost instant *rapport* with informants and to appreciate the "beauty" of Cheyenne techniques [6]; in other respects their characters were complementary, never more so than in the matter of obtaining a balance between imaginative insight and hard fact. Llewellyn's genius lay in devising new approaches, he was less fitted for applying them systematically. His inclination and aptitude for sustained field-work were limited.[7] Hoebel on the other hand was both by training and temperament an excellent field worker; a man of notable intellectual humility, he was prepared to accept the role of disciple of Llewellyn's theories. He was, of course, predisposed to accept Llewellyn's ideas. Before they met they shared a common interest in the dynamics and functioning of institutions with human behaviour as the central focus. This was a meeting of realistic jurisprudence and functional anthropology. If Hoebel had been a rebel against Malinowski's functionalism, or if Llewellyn had been a more orthodox lawyer, collaboration would have been harder and much less fruitful. This basic harmony of approach was decisive in the success of this attempt to pool the skills and knowledge of scholars from two different disciplines. Both the relationship between Llewellyn and Hoebel and subsequent developments in the study of tribal law are epitomised in Hoebel's striking dictum "'Primitive Law' is the henchman of Legal Realism." [8]

The Cheyenne Way both in style and emphasis bears the unmistakable stamp of Llewellyn. Hoebel subdued, but did not crush, the exuberance of Llewellyn's prose. A vivid impression of the Cheyennes emerges from the book, but there is comparatively little factual information about them to be found in it.[9] *The*

[5] In the mid-1940s Llewellyn and Hoebel embarked on a study of the Pueblo Indians of New Mexico. Llewellyn died before this study was completed.

[6] By "beauty" in this type of context Llewellyn usually meant "aptness" or "fitness for purpose." The final chapter has not inappropriately been described as "almost a prose poem in praise of Cheyenne juristic method." (Cairns, review of *The Cheyenne Way* (1942) 55 Harv.L.Rev. 707 at p. 710.) On Llewellyn's ideas of "beauty" in law, see especially *Jurisprudence*, pp. 171–196, 389–391.

[7] Llewellyn spent a substantial amount of time doing field-work among the Pueblos. One outcome was that he became actively involved in Pueblo affairs. Extensive "field-notes" survive, but Llewellyn's contribution to the systematic collection of data seems to have been rather limited.

[8] Hoebel, *op. cit.*, note 8, at p. 48.

[9] A more straightforward and informative description of Cheyenne culture is to be found in Hoebel's admirable short monograph *The Cheyennes, Indians of the Great Plains* (1960). Readers of *The Cheyenne Way* were referred to George Bird Grinnell's *The Cheyenne Indians* for a general account (Preface).

Cheyenne Way is essentially a theoretical work, illuminated and enlivened by concrete illustrative material, colourfully presented. The book is divided into three parts; the first and third parts are primarily devoted to the exposition of methodological and theoretical ideas in general terms. Part II, the longest part, contains a detailed analysis of Cheyenne " law-ways," but the concrete data is regularly squeezed dry of its general theoretical significance. Thus *The Cheyenne Way* is founded upon two of Llewellyn's favourite themes: self-consciousness in respect of method and cross-fertilisation between concrete data and abstract ideas.

The Theory of Investigation

When *The Cheyenne Way* was published in 1941 it was immediately recognised as a work of major significance. Although it was praised by some jurists,[10] it was accorded far more attention by anthropologists.[11] Subsequently few anthropological studies of " primitive law " have not been influenced, directly or indirectly, by it. The work acted as a general stimulus not least because it helped to convince anthropologists that law-ways of preliterate peoples were capable of systematic and fruitful study; it is not infrequently cited upon points of substance; undoubtedly the most concrete indication of its influence is the extent to which the main methodological device, " the trouble case method," has become a standard tool of English-speaking anthropologists interested in law.[12]

The authors begin their exposition of their " theory of investigation " by outlining the three main approaches open to them.[13] The first, " the ideological approach," concentrates almost exclusively on norms or rules which express notional patterns of conduct, " ideal patterns," " right ways " against which actual behaviour is to be measured. The ethnological work of Post and Kohler and, perhaps, *The Restatement of African Law* are examples of this

[10] The most notable were Huntington Cairns ((1942) 55 Harv.L.Rev. 707), Walton Hamilton ((1942) 10 U.Chi.L.Rev. 231) and N. S. Timasheff ((1942) 7 Am. Sociological Rev. 130), all of whom were interested in the sociology of law.

[11] Especially Lowie (1942) 44 *American Anthropologist* (N.S.) 478; Levi-Strauss (1942) 1 *Jo. Legal and Political Sociology* 155; Redfield (1942) 9 U.Chi.L.Rev. 366 and Malinowski (1942), 2 *Lawyers Guild Rev.* 1, a review article, believed to be Malinowski's last completed work.

[12] *e.g.*, Richardson (Kiowa, 1940), Lips (Naskapi, 1947), Smith and Roberts (Zuni, 1954), Gluckman (Barotse, 1955 and 1965), Holleman (Shona, 1952), Bohannan (Tiv, 1957), Pospisil (Kapauku, 1958), Colson (Plateau Tonga, 1952), and Gulliver (Arusha, 1963). This list is by no means exhaustive. Of the few works on tribal law by anthropologists in which the method was not extensively used, four of the best known were intended primarily as handbooks for courts—Cory and Hartnoll (Haya, 1945), Cory (Sukuma, 1953), Schapera (Tswana, 1938), Howell (Nuer, 1954), *cf.*, Epstein (ed.) *The Craft of Social Anthropology* (1967). In a general account of the development of anthropological studies of primitive law, the contribution of others, *e.g.*, Hobhouse and Radcliffe-Brown, would have to be considered.

[13] The following account is based primarily on Chap. 2 of *The Cheyenne Way* and Chap. 3 of Hoebel's *The Law of Primitive Man.*

approach.[14] The subject-matter of tribal law consists of rules which can be recorded in the form of a quasi-code or restatement, whether or not they are fully articulated by the people subject to them. In this approach the emphasis is almost exclusively on perspectives, *i.e.*, on what people think.

There are a number of difficulties about this rule-centred approach. First, in some societies people do not think in terms of rules: " A Comanche, or a Barama River Carib does not like to think that way. He finds trouble in reducing such general ' norms ' to expression or in stating a solution for an abstract or a hypothetical case." [15] Secondly, neat collections of statements of rules may not by themselves adequately explain the results of decision-processes nor the part played by such rules in these processes. It is sometimes forgotten that rules do not perform identical functions in all contexts. Several anthropologists have observed that in some societies actual settlements of disputes frequently do not conform with what are held out to be the accepted norms of the society. For instance, Gulliver reports that among the Arusha of Northern Tanganyika (now Tanzania) there are commonly enunciated and accepted norms of behaviour and these norms are regularly quoted during the process of settling disputes between members of the tribe. Yet, says Gulliver, " Whilst it would be incorrect to say that an agreed settlement of a dispute never wholly conforms with the relevant, socially accepted norm, it is true to say that such precise conformity is the exception." [16]

The divergence between stated norms and actual results is not restricted to preliterate societies. Nor is the related phenomenon

[14] For a critique of the early phases of *The Restatement of African Law* see Twining: *The Place of Customary Law in the National Legal Systems of East Africa* (Chicago, 1964); for a reply, see Cotran: " The Place and Future of Customary Law in East Africa " in *East African Law Today* (I.C.L.Q. Supplement No. 12, 1966), pp. 85–89. Cotran maintains, *inter alia*, that while working on the *Restatement* in Kenya he did analyse " trouble cases," but his description of his method suggests that it was quite different from that of Llewellyn and Hoebel.

[15] *The Cheyenne Way*, p. 22. A common response to the refusal of informants to talk in terms of rules has been to conclude that " These people do not really have ' law '." This was the reaction of the anthropologists who were sceptical about Hoebel's Comanche project (*supra*). Another response has been to seek for norms implicit in the behaviour or talk of informants, especially those who are participants in decision-making. Thus Fallers, on finding that the elders among the Basoga of Uganda were unable or unwilling to talk in terms of general rules, attempted to find general principles of law implicit in their questions and comments during judicial proceedings (Fallers: " Customary Law in the New African States " (1962) *27 Law and Contemporary Problems* 605). In *The Cheyenne Way* a cautious statement of the Cheyenne law of killing is set forth in normative form, prefaced by the *caveat* that this is " a somewhat modernized and consciously articulate statement of the norms, as they appear in action, in the recorded cases and opinions " (p. 165 *et seq.*).

[16] Gulliver: *Social Control in an African Society* (1963) at p. 241 (*cf.* Pospisil: *Kapauku Papuans and Their Law*, *passim*, esp. pp. 286–288 (1958). Gulliver's theoretical models of the " judicial " and the " political " types of dispute-settlement processes (p. 296 *et seq.*) need to be considered in the light of modern jurisprudential writings on " the nature of the judicial process."

of " normative ambiguity "—the co-existence of sets of norms which conflict or which at least have opposing tendencies.[17] Llewellyn himself convincingly illustrated the point with reference to the rules of interpretation of statutes by placing a collection of those rules, each backed by authority, into two parallel columns, with each rule in the left-hand column countered by an opposing rule in the right-hand column.[18] Another limitation of " the ideological approach " is that it tends to ignore such phenomena.

Not all of Llewellyn and Hoebel's predecessors had been wedded to the ideological approach. In particular Malinowski, Rattray and Barton had published outstanding studies which revealed a healthy scepticism about generalised statements of rules and which were based on sustained first-hand observations of actual behaviour. " The norms are there, but they are buried in a rich lode of fact." [19] The authors of *The Cheyenne Way* admired these works, but they found them deficient in two respects: first, the descriptions of behaviour were over-generalised, lacking in detail and failing to give a complete picture of how things actually worked.[20] Secondly, they tended to concentrate on substantive law, neglecting the procedural aspects: " If law, as the students of Anglo-American jurisprudence have long held, is secreted in the interstices of procedure, much is obviously missed in the substantive over-emphasis characteristic of the descriptive approach." [21]

Llewellyn's main contribution to anthropology was to introduce a tool that corrected these two defects, *i.e.*, the detailed analysis of actual disputes. This form of " case method " is not to be confused with the Langdellian method of instruction nor with the standard use of cases by common law writers of treatises and articles. It is related to both, but it is distinct from them. Still less should it be confused with the use of hypothetical examples in questioning

[17] Proverbs provide a simple illustration: *e.g.*, " Too many cooks spoil the broth," but " many hands make light work." The writer has been told of an instance, which he has been unable to substantiate, of a tribe on the East Coast of Africa which was exposed to Islamic influence. At conclaves in which disputes about succession were settled, it would regularly occur that one party would advance an argument based on tribal custom to be met by an opposing argument based on Islamic notions. When asked by an anthropologist why they did not resolve this kind of doubt once and for all, by agreeing on a single consistent body of rules, his informants reacted with incredulity that anyone should make so naïve a proposal. How, he was asked, could disputes be satisfactorily settled, if there was only one set of rules to fall back on?

[18] " Remarks on the Theory of Appellate Decision . . ." (1950) 8 *Vanderbilt Law Rev.* 395, reprinted in part in *The Common Law Tradition*, at Appendix C (1960). Several other writers have commented on the general tendency in the common law for " doctrines to travel in by pairs of opposites " (*e.g.*, Lasswell and McDougal, discussed Bodenheimer: *Jurisprudence* (1962), pp. 140–143). Julius Stone goes so far as to say that " competing versions of a legal category are a normal feature of the authoritative materials in the common law," *Legal System and Lawyers' Reasonings* 254 (1964).

[19] Hoebel, *op. cit.*, p. 85.

[20] *e.g.*, Malinowski's *Crime and Custom in Savage Society*, the pioneering " descriptive " work, only used six actual cases (Hoebel, *op. cit.*, p. 84).

[21] *Ibid.*

informants. The " trouble case method " consists of examining in detail the processes involved in settling actual disputes. What happened, what each participant did in relation to the dispute, what steps were taken by what other persons, the final outcome, the reasoning of the deciders, the effects of the decision on the parties themselves, on future trouble cases and on the general life of the group are to be considered in depth. " A case, a situation, was not to be let go until it had been wrung of its last possible implication for the whole." [22] In *The Cheyenne Way* over three hundred pages of interpretation rest largely on this kind of treatment of only fifty-three cases.

The authors made a number of claims for the method: by studying actual cases the phenomenon of competing norms can be perceived and understood; it overcomes the problem of refusal or inability of informants to articulate norms; the extent of coincidence or divergence between articulated norms and the outcomes of dispute-settlement processes can be checked; trouble cases show how established forms are in fact used, which is more illuminating than a bare statement of the form; the relationship between the " law " of the group and the " sub-law stuff " of each sub-group may be brought out by the study of disputes; in a crisis one can actually see the culture at work; and finally, trouble-cases are in themselves important phenomena:

> " The case of trouble, again, is the case of doubt, or is that in which discipline has failed, or is that in which unruly personality is breaking through into new paths of action or leadership, or is that in which an ancient institution is being tried against emergent forces. It is the case of trouble which makes, breaks, twists, or flatly establishes a rule, an institution, an authority. Not all such cases do so. There are also petty rows, the routine of law-stuff which exists among primitives as well as among moderns. For all that, if there be a portion of a society's life in which tensions of the culture come to expression, in which the play of variant urges can be felt and seen, in which emergent power-patterns, ancient security-drives, religion, politics, personality, and cross-purposed views of justice tangle in the open, that portion of the life will concentrate in the case of trouble or disturbance. Not only the making of new law and the effect of old, but the hold and the thrust of all other vital aspects of the culture, shine clear in the crucible of conflict." [23]

The authors might have stressed two other points. First, their method of presentation facilitates a relatively clear-cut distinction between data and interpretation. One weakness of many of the works in the ideological tradition is that no such distinction is observed; often an element of interpretation is of necessity involved in the process of formulating a bare statement of rules.[24] Secondly,

[22] Hoebel, *op. cit.*, note 1 at p. 748. [23] p. 29.
[24] See Twining, *op. cit.*, note 14 at pp. 47–49.

the illumination of the general by concentrated focus on the particular has close parallels with drama, in that the subject-matter is brought to life in a way that is not often achieved by a flat description. Although *The Cheyenne Way* contains comparatively little straightforward information about the Cheyennes, it offers profound insights into their culture, together with a vivid impression, coloured no doubt by Llewellyn's imagination, of its flavour and atmosphere and, to use Malinowski's phrase, the other "imponderabilia of native life." Larger than life characters, the wise High Backed Wolf, the mean Cries Yia Eya and the wilful Sticks Everything Under His Belt stalk the pages adding entertainment to illumination.

A possible criticism of the trouble case technique is that it is "anecdotal," in the sense that crises are often not typical of ordinary life and that the cases selected for intensive analysis may well be untypical even of crises. By concentrating on the unusual a writer may give a distorted picture of the culture he is studying. This is especially likely if the epoch-making case is preferred to the "petty rows, the routine of law-stuff" referred to above. Furthermore, if each case is to be analysed in detail and depth, only a relatively small sample is likely to be used, with a corresponding decrease in the chances of its being representative. These would be valid criticism of a work which relied on this method to the exclusion of all others, even if care were taken to obtain a spread of cases. However, Llewellyn and Hoebel insisted that the intensive analysis of cases was not the only technique that they recommended. The normal field techniques of the anthropologist were a necessary supplement to the study of cases. Their chapter on method was not intended as a substitute for a handbook on field-techniques.[25]

In *The Cheyenne Way* itself the potentialities of the technique could not be fully exploited. The book, written in the "ethnographic present," relates to the period 1820–80. Hoebel's main field work was done over fifty years later, and the cases reported are based almost entirely on hearsay and tradition. The "trouble case method" is most effective and reliable when it is based on first-hand observation, and this was obviously not possible in the circumstances. The authors were fully aware of the dangers of relying on accounts by informants of events of long ago and they took great pains to cross-check different versions and to test reliability in other ways. They themselves were reasonably satisfied with the historical accuracy of most of their data; several reviewers of the book expressed admiration at the combination of caution and ingenuity that was displayed in dealing with such limited and tricky material. The authors were for the most part restricted to examining what their informants believed to have happened. It is, therefore, important to point out that even if the informants' accounts

[25] pp. 21–22.

of cases were entirely fictitious they would still have been significant, for the stories were expressed in terms of Cheyenne concepts and are told against a background of actual institutions which are presupposed and taken for granted: "war party," "council of Forty-Four," "Buffalo Chief," "Dog Soldiers," a tribal hunt, and so on. An essential part of understanding the institutions of a society is to grasp the ways of thought of the people whose institutions they are. Myths and stories are as effective a way of getting at these "perspectives" as are direct questioning or the recording of discussions that take place in dispute-settlement and other processes. In so far as stories and myths are considered to be significant by the informant, they are *primary sources* in respect of understanding the concepts, values, attitudes and thought-patterns of the informants. The authors grasped this point, but they are open to the criticism that they did not press it far enough. As Hoebel himself has admitted, they could also have fruitfully subjected the Cheyenne language to much more intensive analysis. It was left to others, notably Gluckman and Bohannan, to wed the techniques of linguistic analysis to the gift of realism, the "trouble case."

Lawyers, especially English-trained lawyers, when they have devoted their attention to tribal law have rarely adopted the "trouble case technique." This can be seen by a glance at the fast-developing literature of "African customary law," a literature which is remarkable for the disappointing lack of communication and interaction between lawyers and anthropologists. The gap is partly to be explained in terms of different objectives, and different assumptions about the subject-matter, but above all in terms of differences in method. Even when lawyers have been modest enough to restrict themselves to a single tribe, they have normally been content to adopt the methodology of the English legal textbook writer, a methodology (if such a term can be appropriately applied to so unself-conscious a tradition) which, however well or ill-adapted it may be to the English context, often fits African customary law as comfortably as an Eton jacket would fit a surf-bather. Generally speaking the lawyers have stayed close to the ideological approach; in respect of their use of cases they have tended to follow the example of English textbook writers rather than *The Cheyenne Way*. One result of this has been a tendency to consider substantive doctrines in isolation from the procedural contexts of their application and operation.

On the other hand, the leading anthropological works on customary law in Africa and elsewhere, although they do not conform to a single stereotype, have nearly all followed the example of *The Cheyenne Way* in rejecting "the ideological approach" as being, at best, incomplete and in nearly every instance in making the detailed analysis of "trouble cases" a crucial focus of attention.[18]

[18] *Supra*, note 12.

In so doing they have, *inter alia*, avoided the dangers of segregating "doctrine" from "process," or "substance" from "procedure"; there is a certain irony in thus finding the anthropologists to be more direct inheritors of Maitland's teaching than his natural descendants, the common lawyers, when they have ventured outside their own culture. In sum, in recent studies of "tribal" or "customary" or "primitive" law, whereas lawyers have rarely escaped from the clutches of a blinkered formalism, most anthropologists have been working in harmony with Llewellyn's brand of legal realism.

THE LAW-JOBS AND THE INSTITUTION OF LAW-GOVERNMENT

The Cheyenne Way contains one of the first published statements of Llewellyn's ideas about the functions of law. "The law-jobs theory," as it is commonly called, is best seen as the starting-point of Llewellyn's general sociology of law, his "working whole view." In this section an elementary analysis of this aspect of Llewellyn's thought will be attempted. This analysis is based on a variety of sources [27] in addition to Chapters 10 and 11 of *The Cheyenne Way*.

The central proposition of Llewellyn's theory is that there are certain needs that must be met for a human group to survive as a group and for it to achieve the purposes for which it exists.[28] This applies equally to very small groups, such as a married couple or a partnership, as to the largest and most complex groups, such as a nation or state or even the world community. It is applicable to groups with a limited *raison d'être*, for instance a school debating team or a football club, as well as to groups that are related to many phases of the lives of their members, such as a family or tribe. It applies to groups which are ephemeral as well as to those which

[27] Especially: (i) "The Normative, the Legal and the Law-Jobs: The Job of Juristic Method" (1940) 49 Yale L.J. 1355; (ii) *My Philosophy of Law*, ed. Kocourek (1941) p. 183; (iii) "Law and The Social Sciences—Especially Sociology" (1949) 62 Harv.L.Rev. 1286, reprinted in *Jurisprudence: Realism in Theory and Practice* (1962) 352; (iv) *Law in our Society: A Horse-Sense Theory of the Institution of Law*, unpublished mimeographed course materials (1950 edition, revised and supplemented in subsequent years). There is little doubt that this is the most important of the extensive collection of unpublished manuscripts in the Llewellyn papers in the University of Chicago Law School. As it is largely in note-form and is unfinished it presents some very difficult editorial problems.

The Cheyenne Way and (i) and (ii) contain Llewellyn's first published attempts at a rounded general theory of law. Neither of these could be said to be "definitive" in that Llewellyn continued to develop his ideas during the next 20 years and, at the time of his death he considered that he had not yet achieved a formulation which satisfied him. The most developed version is to be found in (iv) which differs in a number of points of detail from the earlier writings. The most important of these is the shift from "the institution of law" to "the institution of law-government" as his organising concept, see *infra*.

[28] This statement suggests two questions which cannot be pursued here: (i) is the statement a tautology? (See Llewellyn, 49 Yale L.J. at p. 1373); (ii) how far was Llewellyn committed to a purely teleological conception of "group"—*i.e.*, did he assume that all groups exist for some purpose or purposes?

are enduring. The needs arise particularly from a facet of human nature, *viz.*, that human beings have drives, desires and interests which tend to be incompatible. In so far as those " divisive urges," as Llewellyn called them, are a source of actual or potential conflict and in so far as conflict is inimical to group-survival and to concerted effort to a common end, conflict-prevention and conflict-resolution are a necessary precondition of group-survival and group-effectiveness.

Llewellyn classified the main needs (" jobs ") into six categories: (i) " Adjustment of the trouble case "; (ii) " preventive channelling of conduct and expectations "; (iii) " preventive re-channelling of conduct and expectations to adjust to change "; (iv) " arranging for the say and the manner of its saying " (allocation of authority and procedures for authoritative decision-making); (v) provision of direction and incentive within the group (" the job of providing Net Positive Drive "); and (vi) " the job of Juristic Method." [19]

Groups which qualify to be called " societies " have institutions, more or less developed and specialised, the peculiar function of which is to perform these " law-jobs." In Llewellyn's later usage " law-and-government " (or " law-government ") is the term used to refer to such institutions. In society " law-government " is the main, but not the only institution, for performing the six jobs listed above; conversely " the law-jobs " are the main, but not the only, jobs of the institution of law-government.

In one of his summaries, Llewellyn continues:

> " In the doing of each of these law-jobs one can distinguish a bare-bones aspect which runs no further than the keeping of a society (or indeed of any group) together and alive; and, in addition, two ideal aspects. The one ideal aspect has to do with efficiency of operation. The other has to do with the realization of man's aspirations.
>
> Around the law-jobs (which are inherent in the nature of any group, big or little) there develop (in any group) activities. When these activities become distinct enough to be recognizable as such, the stuff of law has thereby become observable as such. When men specialize in such activities, the men of law become recognizable. Both the men and the stuff show, as distinguishing marks, a more-or-less regularity of action, and show felt standards, more or less articulate, as to the manner and direction of such action. It is ill-advised to take either the practices or the standards, to take either the men or the practices-and-standards, as being alone somehow *the* substance of law. The going institution takes them in, all together. ' Precept ' and ' principle,' *e.g.*, to be part of a legal system, must be somehow actually at work in that system, and only in and through men and ideas *held* by men can they be at work.

[19] In some versions Llewellyn listed only five categories, (ii) and (iii) being combined. The most extensive elucidation of each of these categories is to be found in 49 Yale L.J. at p. 1375 *et seq.* Llewellyn's special interest was in juristic method (see *infra*).

> Practice, again, is the bony structure of a legal system. Yet practice is no part of *law* except as it comes wrapped in and is measured constantly against the held norm or felt ideal. Men are the life blood of a legal system, yet men are not even of it, save as bedded in a context of tradition, both existent and becoming, which shapes the men even as it is being shaped by them.
>
> Out of the conjunction of activities and men around the law-jobs there arise the crafts of law, and so the craftsmen. Advocacy, counseling, judging, law-making, administering—these are major groupings of the law-crafts. But mediation, organization, policing, teaching, scholarship, are others. At the present juncture, the fresh study of these crafts and of the manner of their best doing is one of the major needs of jurisprudence." [30]

This, in bare outline, is the conceptual framework of Llewellyn's attempt at a synthesis of his ideas, a synthesis which he qualified by labelling it a tentative " working whole view." [31] Limitations of space preclude a detailed analysis and evaluation of this theory here; however it may help to relate it to other juristic theories and to some common misinterpretations of Llewellyn, if the concept of " the institution of law-government " is briefly elucidated.

In the first chapter of *The Bramble Bush* Llewellyn, echoing Holmes, once made the rash statement: " What officials do about disputes is, to my mind, the law itself." [32] In bland disregard of the context, of Llewellyn's other writings and even of an explicit retraction in 1951, commentators have sometimes treated this as " Llewellyn's definition of law." The statement was designed to shock first-year students out of the assumption that the study of law consists solely in learning rules; it has been treated as if it were the organising concept for a whole legal theory. It was never intended as such. This is supported, *inter alia*, by the opening passage in his first article on " realism " which was published in the same year. In this passage he specifically refused to define " law " and he set out at length his reasons for refusing.[33] The passage

[30] *My Philosophy of Law* (ed. Kocourek), pp. 187–188 (1941).

[31] *op. cit.* note 27 (iv) at p. 9. Llewellyn was at pains to stress that he was trying to develop a simple, admittedly crude, theory for the ordinary law student and lawyer (" Jurisprudence for the Hundred Thousand," *ibid.* p. 9.) rather than a refined and sophisticated theory for jurists (" Jurisprudence for the Hundred "). This article proceeds on the assumption that the theory is nonetheless of potential interest to " the Hundred."

[32] 2nd ed. at p. 12 (see *supra*, 30 M.L.R. 527, note 46).

[33] " A Realistic Jurisprudence—The Next Step " (1930) 30 Col.L.Rev. 431, reprinted *Jurisprudence: Realism in Theory and Practice*, p. 1 (1962). During the drafting of *The Cheyenne Way* Hoebel was anxious to include a general stipulative definition of " law " in the text. Llewellyn disagreed. He set out his reasons informally in a letter to Hoebel, dated January 24, 1938:

> " The more I think about your universal definition of law, the less I am disposed to like it. I find it very difficult to frame any definition which covers the situation in a non-state, non-authority society, and also has adequate application to a modern society. My own approach has been to set up a Weberian ' ideal type ' with a good many attributes, such as rules with verbal form, machinery for enforcement of a recognized claim, if needed,

reveals a more sophisticated understanding of the nature and functions of definitions than the critics of the famous sentence allowed for. It also implies that at that stage Llewellyn was not purporting to advance a comprehensive theory of law. He was concerned with certain theoretical questions with wide implications, but not as yet with his "working whole view."

Llewellyn laid stress on the value of the concept of "institution," which he explained as follows: "An institution is in first instance organized activity built around the doing of a job or a cluster of jobs. A craft is a minor institution. A major institution differs in that its job-cluster is fundamental to the continuance of the society (or group) with typical resulting complexity." [34]

Llewellyn's emphasis on the concept of "institution" is understandable. By defining it in behavioural terms he was able to make human behaviour a central focus of his jurisprudence; by taking as his starting-point a sociological concept he hoped to facilitate communication between lawyers and social scientists; and he found positive virtues in its vagueness. He deliberately avoided precise stipulative definitions of abstract concepts, so beloved of

with exclusivity when applicable; the force of the state behind action; a specialized enforcing, and litigation and counselling personnel, and the like. It will take quite a while to work out in detail every attribute necessary to present this ideal type. It will never find a complete counterpart in life, unless an arbitrary choice is made between the elements of certainty and of justice—a point over which I am still puzzling.

However, setting up some such type at one pole and unpredictable chaos at the other, we can, it seems to me, identify certain subject-matters or jobs which law stuff, in various degrees of primitivity or development of form or kind (procedure for adjustment, existing either apart from or in conjunction with, third-party personnel; supernatural sanctions existing either apart from or in conjunction with secular, and the like) is doing or accomplishing in any group or society. The only absolutely universal characteristics which I find, consist in the presence of these jobs which need doing, and in a *tendency* for any steps in the doing of them to take on, unless thwarted by governing causes, some aspects of regularity in regard to both pattern and personnel. I think this is a sounder approach than any which rests upon a criterion of rule, of rightness, or of course of conduct, or monopoly of force, or state command of any other simple criterion that I have met.

The essence of an attack on the phenomena is the wherewithal to indicate gradations. Nothing in the matter of form is universal; and any definition built to fit primitive conditions falls down when the State steps in, not displacing the primitive forms, but running largely beside them, and only sometimes overlapping or conflicting."

No general definition of "law" appeared in *The Cheyenne Way*, but Hoebel, apparently unconvinced by Llewellyn's arguments, included one in *The Law of Primitive Man*: "A social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force by an individual or group possessing the socially recognized privilege of so acting" (p. 28).

[34] *Law in Our Society*, p. 21. When asked for further elucidation he used to refer questioners to the excellent article on "Institution" by Walton Hamilton in (1932) 8 *Encyclopaedia of Social Sciences* 84; see also Sumner, *Folkways*, *passim*. Llewellyn commented: "I think it interesting that those of us who tend to see 'institution' as the central and most important concept in social science (I should reckon in Max Weber, J.R. Commons, Hamilton, Malinowski) have been heavily influenced in our thinking by work on the legal side" (*Jurisprudence*, at p. 356).

system-builders like Bentham and Lasswell, because he could see little profit in them and a great danger that they would be used as arbitrary criteria of what is relevant and irrelevant to jurisprudence.[35] Finally, Llewellyn claimed, looking on law as an institution " provides two vitally serviceable points of orientation which freshen eyes and give a cross-check on what may be there to see. For, first, a going institution has jobs to do, and its function is to get them done effectively and well. This gives a goal of purpose and value to measure by. And, secondly, a going institution has results in life, and must be tested by them; and those results are capable of inquiry. The measure of the institution is, then, the measure of how its results check in fact, in regard to the actual doing of its jobs."

Llewellyn consistently refused to commit himself to a general stipulative definition of either " law " or " law-government." This does not mean, however, that he refused to provide any elucidation of his usage of these terms or of the relation of his to other usages. By maintaining that law-government was only one of the institutions which perform the law-jobs in society, he was committed to accepting some distinction, albeit not a rigid one, between it and other institutions. However, in the opinion of the writer, Llewellyn's attempted elucidation of " law " adds little that is new and has been improved upon in some respects by other jurists, notably by Professor Hart. For present purposes let it suffice to say that Llewellyn considered " the legal " to become differentiated as the following attributes of an institution performing the law-jobs become perceptible: specialised personnel recognised as speaking for or with the authority of the whole (" officialdom "), supremacy within the group, effectiveness and regularity.[36]

Two unusual aspects of Llewellyn's analysis do deserve comment. First, as has already been noted, in the late 1940s Llewellyn adopted the concept " law-government " in preference to " law." His justification for joining together " law " and " government " was that these two terms refer to institutions which are primarily concerned with the same basic function, " the job that is fundamental to the existence of any society and any social discipline at all; it is the job of producing and maintaining the groupness of a group." [37]

[35] " A definition both includes and excludes. It marks out a field. It makes some matters fall inside the field; it makes some matters fall outside. And the exclusion is always rather arbitrary. I have no desire to exclude anything from matters legal. In one aspect law is as broad as life, and for some purposes one will have to follow life pretty far to get the bearing of the legal matters one is examining " (*Jurisprudence*, p. 4).

[36] *Law in Our Society*, pp. 21–22. For a complete analysis each of these ideas would require further elucidation, as would a number of other concepts, some of which were coined by Llewellyn—notably " akelegal," " jurid," " law-stuff," " law-ways " and " The Legal " as opposed to " the legal."

[37] *Jurisprudence*, p. 357. In trying to develop this idea he added: " The chart picture of the single institution would be a long ellipse, every point of circumference or area related, to some degree, to *each* of two imaginary foci.

Finally, it should be noted that Llewellyn was trying to construct a theoretical model of " law-government " as a tool of description in lieu of a dogmatic formulaic " definition of law." In this he was influenced by Weber's concept of " ideal types." For the traditional litmus paper tests of " law " and " not law," he was hoping to substitute a more flexible, and generally more sophisticated, tool of descriptive analysis. It is not always clear from his writings whether Llewellyn looked on his " law-jobs " theory as being more of an empirical than an *a priori* theory; that is to say it is not always clear whether he wished his statements about the law-jobs to be treated as empirical generalisations capable of verification or to be treated as elucidations of an armoury of related concepts of which " group," " divisive urges," " law-job," " institution," " law-government," and " human behaviour " were the most important. It is suggested that it is more fruitful to adopt the latter interpretation, in so far as it is necessary to make a choice between the two. So viewed, Llewellyn's aim was not so very different from Professor Hart's in *The Concept of Law*.[28] In spite of the very real differences in emphasis and style between these two jurists, both have been concerned to develop working concepts for a descriptive sociology of law. In this view, the list of six law-jobs can be treated as a crude check-list of questions to ask when examining the structure and operation of any human group: How are conflicts handled within the group? How is behaviour channelled so as to avoid conflict? How is authority to make decisions allocated? What procedures have to be followed in authoritative decision-making? and so on. By developing a set of concepts which could be applied to *any human group*, Llewellyn claimed to have provided a means of exploring the similarities and the differences between " primitive " and modern industrialised societies, between the world community and smaller societies and between sub-groups within a major group (" The Entirety ") or between the major group and some sub-group within it.[29] This claim surely deserves attention, for, if it is at all justified, it established Llewellyn's theory as one of major significance. In the form in which he left it, the theory was admittedly a crude one, in need of considerable

The one focus (never found alive) would be complete regularity utterly independent of judgment and person; the other (never found alive, either) would be non-recurrent action determined utterly by the particular acting official's idiosyncratic and also non-habitual choice. The ' law ' phases of law-government are closer to the first focus; the more purely ' government ' phases are closer to the second." (*Law in Our Society*, supplementary materials, p. 112 (1956).) At least the first four of the six " jobs " listed above are normally done in a manner that approximates more nearly the " law pole," they are characteristically " law jobs," the others range widely between the poles. There are some other " jobs," such as defence of the group, which come nearer to the governmental pole. By this slight adjustment of focus Llewellyn hoped to bring into a close relationship jurisprudence, politics and sociology.

[28] Hart: " Notwithstanding its concern with analysis the book may also be regarded as an essay in descriptive sociology " *et seq.* (Preface).

[29] For other claims made for the theory see 49 Yale L.J. at 1380.

refinement. It is particularly unfortunate that Llewellyn should have died when he was just about to re-direct his attention to this subject.

It is appropriate to end this brief introduction to " the law-jobs theory " by quoting one of Llewellyn's most suggestive insights:

> " [T]he jobs to be done are jobs to be done; modern complexity of institution serves merely to highlight processes which require to be gone through, in some fashion in any group. *The jobs, therefore, get themselves done after some fashion* always—or the group simply is no more.[40] Hence if the officially announced imperatives fail to put themselves over, one must look elsewhere for the doing of the jobs . . . Hence to see a Legal regulation which is not working is promptly to face a problem of further inquiry: what *is* working? and how?" [41]

The Place of *The Cheyenne Way* in Llewellyn's Intellectual Development

The Cheyenne Way marks a crucial stage in the development of Llewellyn's thought. The inspiration for it came from his early realism; some of the inspiration of his later ideas came from studying the Cheyennes. To the normal gains in self-understanding of any comparative work was added the particular value of studying a simple society, that is the opportunity to study a microcosm that can be seen in the round, relatively free from the refinements, distractions and confusions of complexity. It is never easy to see a modern industrial society as a whole in elemental terms. It is much easier to do so if one has first had the experience of a microcosm.[42] Llewellyn's frequent use of examples from another kind of " primitive society," the nursery, served the same function.[43] There are, of course, many pitfalls in comparing the simple with the complex, but Llewellyn was not prone to underestimate the complexity of things and he was careful not to push his analogies further than he felt was justified by repeated testing. Maitland once said: " The traveller who has studied the uncorrupted savage can often tell the historian of mediaeval Europe what to look for, never what to find." [44] Llewellyn would surely have agreed with this statement and its implications. What he derived from the Cheyennes was not a set of broad factual generalisations about law, but inspiration for some new tools for functional analysis. *The Cheyenne Way* was a hypothesis-forming more than a hypothesis-testing book.

The Cheyenne study was the catalyst for a twofold advance in Llewellyn's thinking:—first, it marks a definite shift to a more

[40] *Vide* note 28 (i), *supra*.
[41] *Op. cit.* note 30, at pp. 1881–1882 (Llewellyn's emphasis).
[42] This is a partial answer to Frank's jibe that Llewellyn would have spent his time better in studying the law-ways of the " Tammany Hall Indians " in New York. *Courts on Trial*, p. 77 (1963 ed.).
[43] *e.g.*, pp. 43–44.
[44] Collected Papers, Vol. III, p. 800.

consistent and more general standpoint than previously. Llewellyn's early private practitioner orientation has already been remarked.[45] From now on, even when considering the detailed problems of specific participants, Llewellyn's perspective is consistently that of society as a whole. At the same time his ideas move more easily on to a general plane, with implications that are seen to transcend a particular society at a particular time. The second advance is in respect of legal technology (" the job of juristic method "): it is at the time of the Cheyenne study that the associated ideas of " craft," " style," " the job of juristic method," and " legal aesthetics " are adopted as working concepts. In particular, Llewellyn specifically credited the Cheyennes with inspiration for one of the major themes of *The Common Law Tradition*: the idea of the Grand Style of appellate judging.[46]

One of the most striking features of the book is the claim, in places made in somewhat extravagant terms, that the Cheyennes possessed " legal genius." The gist of the claim is that the Cheyennes regularly adopted a flexible and creative problem-solving approach to performing the law-jobs, especially in respect of settling disputes. The Cheyennes were somewhat inarticulate, they lacked developed legal forms or a sophisticated system of concepts. What then constituted their " legal genius " ?

> " We are referring to the classical Roman jurist's *ways of work*, the deftness and boldness of line with which the apt solution is marked in swift, sure strokes that fit at once justice, policy, and the given body of legal and social institutions,—those ways of work which are the modern Romanist's delight and his despair." [47]

A high proportion of Llewellyn's work, especially in later years, is concerned with juristic method: the study of the techniques of appellate judging and appellate advocacy in *The Common Law Tradition*; his interest in development of the formal teaching of skills in legal education [48]; his attack on the problems of the strategy and tactics of drafting a uniform code; and his self-consciousness about his own methods in *Cases and Materials on the*

[45] *Supra* (1967) 30 M.L.R. at p. 527.

[46] *The Common Law Tradition*, p. 513.

[47] p. 313. The authors regularly praise the Cheyennes for shrewdness and ingenuity in solving specific problems raised by cases discussed in *The Cheyenne Way*; more general indications of Cheyenne " legal genius " are said to be the elimination of the feud, the limited resort to appeals to the supernatural for assistance in fact-finding, their concern for rehabilitation of deviants and their frugal, but effective, use of legal fictions. The main claim is that they regularly succeeded in reconciling the conflicting demands of " law " and " justice " (see especially p. 333). It is fair to say that in *The Cheyenne Way* the authors devote more space to rationalising their admiration for *the results* achieved by the Cheyennes than to a systematic analysis of the methods employed to achieve these results; in *The Common Law Tradition*, Llewellyn struggled to rationalise his admiration for the manner of approach (The Grand Style).

[48] *Op. cit. supra*, (1967) 30 M.L.R. 527, n. 48.

Law of Sales and *The Cheyenne Way* are the most important examples. He saw the best hope for the improvement of law to lie in the continuous improvement of juristic method, an improvement which could only be achieved and maintained by making lawyers conscious and articulate about their ways of work. His "theory of the crafts of law," which developed this idea, was never expounded in print[49]; yet he thought that it was probably his most original contribution to jurisprudence.

Nearly all of Llewellyn's jurisprudential work after 1940 consists of an elaboration of two themes—"the whole view" and juristic method.[50] *The Cheyenne Way* contains in an elementary form a great many of Llewellyn's basic ideas. Except perhaps for *The Bramble Bush*, it is the most readable of his books, and for this much credit must go to his collaborator. For these reasons *The Cheyenne Way* currently offers the best available introduction to Llewellyn's thought.

CONCLUSION

The two books here considered are but a fraction of the corpus of Llewellyn's works, which, on a generous interpretation of "work," can be counted in hundreds. The present attempt to stimulate interest in Llewellyn is offered without undue optimism, for it is clear that, like the Philosopher of the Clothes, whose garb Llewellyn sometimes donned in self-parody,[51] "a paramount popularity in England we cannot promise him."[52] However, one perhaps may be a little less pessimistic than Teufelsdröckh's Editor, who ended on the following note:

> "Well does he know . . . that innumerable British readers consider him, during these current months, but an uneasy interruption to their ways of thought and digestion; and indicate so much, not without a certain irritancy and even spoken invective."[53]

WILLIAM TWINING.*

[49] The most detailed analysis is in *Law in Our Society*, *op. cit.*, *supra*, note 27, at pp. 18–19.

[50] A useful summary of Llewellyn's conception of the relationship between realism, juristic method and his "whole view" (here equated with jurisprudence) is to be found in an unpublished manuscript: "If jurisprudence of necessity includes a study of ideals for law, then realism is not [co-extensive with] jurisprudence. If, as I think, jurisprudence contains a dozen subdisciplines, then realism deals with two out of the seven: craft techniques and descriptive sociology . . . Either or both are compatible with *any* philosophy about law's proper ultimate or immediate goals or about those of men in society. Realism in law is thus as ethically neutral as the science of mechanics or the art of bridge-building."

[51] *e.g.*, "Jurisprudence, The Crown of Civilization" (1938) 5 U.Chi.L.Rev. 171.

[52] Carlyle, *Sartor Resartus*, p. 20 (Everyman ed.).

[53] *Ibid.*, at p. 224.

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STATUTES

Companies Act 1967

It would perhaps be misleading to speak of the "object" of so miscellaneous a statute as the Companies Act 1967. That it incorporates some useful features is undeniable. In other respects, it betrays superficiality and haste, though the promise of future legislation to some extent disarms criticism.[1] Broadly, its most important features are the abolition of the exempt private company, the extension of disclosure requirements, a limited foray into the area of directors' duties, and the regulation of insurance companies. For reasons of space, this note is concerned primarily with the general company law provisions of the Act.

The exempt private company, created in 1948 as a means of providing privacy for the affairs of the small family business, became in due course the dominant form of private company, used both by the small concerns for which it was originally created and by many larger concerns as well.[2] Of its privileges, only the privilege of non-disclosure was strongly defended by 1961, and this had to be balanced against the interest of creditors and the public in full disclosure.[3] In an attempt to reconcile these claims, the exempt private company is abolished, so forcing all limited companies to file accounts.[4] Exemption from disclosure is conferred upon the unlimited company provided that certain conditions are met. These are that at no time has the unlimited company been to its "knowledge" the subsidiary of a limited company, the holding company of a limited company, or the promoter of a trading stamp scheme.[5] In order doubtless to enhance creditor protection, the Act imposes new requirements on conversion from the unlimited to the limited form and vice versa. An unlimited company may register as limited provided that it has not previously converted,

1 Further measures dealing with the structure and philosophy of company law have been promised. See H.C.Deb. (5th ser.), Vol. 741, col. 359 (Mr. Jay). Both fears ("its philosophy will be false, its politics worse, and . . . its economics disastrous," Vol. 741, col. 392, *per* Sir J. Vaughan Morgan) and some rather bizarre hopes (the abolition of the Stock Exchange by 1980 in favour of "investment collectives": *ibid.* col. 429, *per* Mr. Atkinson) have been expressed.

2 Report of the Company Law Committee, Cmnd. 1749, para. 57 (1962); Wedderburn, *Company Law Reform* (1965), found that by 1967 the percentage had risen to 77 per cent. or some 323,000 companies. By 1967 it had risen to 360,000 companies.

3 Report of the Company Law Committee, Cmnd. 1749, paras. 54, 60. See also *per* Mr. Jay at note 1 above.

4 Companies Act 1967, s. 2. The private company is of course retained, but the benefits of so organising are much reduced. By Sched. 2, clause 18 A (5) independent companies with a turnover of less than £50,000 need not disclose turnover figures.

5 Companies Act 1967, s. 47.

under the new provisions, from the limited to the unlimited form.[6] A limited company may register as unlimited provided that the company was not originally registered as unlimited under the new provisions.[7] The shareholders of an unlimited company going limited may be liable for the company's pre-conversion debts, either for a period of three years or, if no former members remain, the company goes into liquidation within a period of twelve months after conversion.[8] The purpose of this provision would seem to be to protect creditors from the possible adverse effects of a sale of the corporate undertaking to third parties following conversion. The consent of all members of the company to conversion is required.[9] There are difficult transitional provisions respecting auditors. Generally, auditors of exempt private companies may continue to audit the company's affairs for a period of twelve months following the coming into force of the relevant section (18). In addition the Board of Trade may recognise persons presently the auditors of exempt private companies and who have been practising as accountants as auditors of unquoted independent companies.[10] This is intended to protect persons practising as accountants but not recognised by the Board of Trade as qualified auditors under section 161 of the Companies Act 1948. One might perhaps inquire whether this complication is really required. Surely a general discretion could have been given to the Board of Trade by amending section 161 of the Companies Act 1948.[11]

Doubtless, the increased disclosure required from all limited companies will prove valuable. But it is doubtful whether the unlimited company will serve any very useful purpose. Persons whose financial position is questionable will probably prefer the limited form. While some reputable family companies may go unlimited, it is doubtful whether this will be a choice commonly resorted to.[12] It is unlikely that the encouragement of the unlimited company will enhance creditor protection significantly. If the Government desire to reduce the number of small incorporations

[6] *Ibid.* ss. 43, 47.

[7] *Ibid.* s. 43. If it has previously been converted under the Companies Act 1948 it may again convert under the new provision. The wisdom of a complete impediment to re-conversion is questionable. If impediments were thought desirable it might have been better to leave the matter in the discretion of the Board of Trade.

[8] *Ibid.* s. 44.

[9] *Ibid.* ss. 43 (2), 44 (2). By ss. 43 (5) and 44 (5) the Registrar's certificate is conclusive evidence of compliance with the section. Hence presumably s. 22 of the Companies Act 1948 cannot apply to this situation and a dissenting shareholder cannot in fact show that he dissented.

[10] Companies Act 1967, s. 18 (1). For the reasons see H.C.Deb. (5th ser.), Vol. 741, cols. 886–887.

[11] Under s. 161 (1) of the 1948 Act the Board already has powers to recognise organised bodies of accountants. It might have been neater to extend the discretion to deal with individual cases.

[12] See Morley, "The Companies Act 1967" (1967) 64 L.S.Gaz. 536, 537, where it is pointed out that even if the directors of a trading company consider the change to be desirable, shareholder unanimity may be difficult to secure. It seems unlikely that the profession view this device with great enthusiasm.

(and recent tax changes are having this effect [13]) it might be desirable to explore whether other modes of business organisation to meet the needs of the small concern should be introduced into English law.[14]

The provisions regarding the disclosure of insider interests are of greater concern. These, it may be noted, relate largely to the interests of directors. Though " director " is widely defined, it is at least surprising that disclosure is not required from senior officials as well.[15] Even more surprising is the very limited foray into the field of fresh remedies against " insider " profits in the interest of prejudiced shareholders.[16] Section 25 represents an attempt to outlaw some abuses of inside information; the purchase and sale of options by directors in the quoted securities of the directors' company or group. By section 30 these provisions will apply to the spouse or infant children of a director. The prohibition can be justified not only on grounds of fairness but also as an anti-manipulative device.[17] Even granted its limited purpose, the section is defective. It does not penalise directors who purvey inside information to their associates or to their adult children unless these are mere nominees [18] nor is there any attempt to regulate the purchase

[13] The primary disincentives to the use of the company in the case of certain smallish concerns relate to the impact of corporation tax. See generally Rowland and Talbot, *Corporation Tax* (1965), Chap. 25. The number of new incorporations is decreasing, and chambers are advising some clients to consider the advantages of the partnership and the trading trust. I am indebted to my colleague Mr. P. G. Whiteman for information about this latter point.

[14] The Government might for example have had regard to the device of the Incorporated Private Partnership suggested in the *Final Report of the Commission of Enquiry into the Working and Administration of the Present Company Law of Ghana*. For the considerations underlying the suggestion, see paras. 25, 26 of the Report. The suggestion was advocated in the House of Lords by Lord Chorley, H.L.Deb., Vol. 278, cols. 1527–1531.

[15] For the purposes of the S.E.C. Act, insiders include corporate officers and principal stockholders. See *Speed* v. *Transamerica Corp.*, 99 F.Supp. 88 (1951). Most Canadian jurisdictions will now include directors and senior officers, persons holding 10 per cent. of the voting shares of the company, and directors and senior officers of a company which is itself an insider of the company. While the 1967 Act deals with 10 per cent. holders and directors of corporate insiders, it does not deal with officers, nor does it, as Canadian jurisdictions now do, permit a shareholder's action against an insider for the disgorgement of profits made through the misuse of specific confidential information. See Wortsman, " The Insider—A Survey in Corporate Disclosure " (1967) 25 Fac.L.Rev. 55; Williamson, *Securities Regulation in Canada*, Supp. 1966 at pp. 355–356.

[16] S. 37 alone seems pertinent here. A discussion of its probable impact is ventured below. America and the Canadian provinces rely on shareholder suits to recover insider profits. They also employ detailed proxy solicitation requirements in the interest of shareholder control. See Loss, *Securities Regulation* (2nd ed., 1961), Vol. II, Chaps. 6B, 6C; Williamson, *Securities Regulation in Canada*, Supp. 1966, pp. 358–364, 378–377. *Cf.* Report of the Company Law Committee, para. 457, recommending the enactment of a declaratory provision relating to proxies.

[17] See Loss, *Securities Regulation*, Vol. I at p. 486.

[18] See the discussion by T. M. Wedderburn, *The Companies Act 1967* at p. 25. For a similar criticism of comparable Canadian legislation see Wortsman, *loc. cit.*, at note 15 above.

and sale of securities by insiders on take-over except by provisions enforcing disclosure of insider dealings.[19] Apart from this limited measure of control, directors may be permitted to subscribe for and deal in company securities.[20] Of course, recent tax legislation has reduced the utility to directors of option dealings,[21] and schemes of the Garda type are struck at by requiring details of any arrangements to which the company is a party with the object of enabling directors to benefit by the acquisition of securities of the company or another body corporate.[22] Boards may be faced with a problem under section 16 (1) (*b*), which requires that the directors' report state the reason for making an issue of shares.[23] The benefits from subscription schemes appear to be emoluments within the meaning of section 196 (8) of the Companies Act 1948 and so will have in some cases to be quantified in order to satisfy the disclosure requirements of sections 6 and 8 of the 1967 Act of dealing with directors' and officers' emoluments.[24] But, the incidental impact of section 8 apart, these provisions are restricted in application to directors.

Disclosure is further enforced by a group of sections dealing with disclosure of directors' service contracts and dealings in securities. A copy of service contracts is to be kept by the company at its registered office, or the place where the register of members is kept, or at its principal place of business. It is difficult to see why a copy should not be filed with the Registrar of Companies as well. Section 27 makes provision for a register of directors' shareholdings by which directors must notify the company of their interests in securities of the company or group, the commencement or cessation of interest, or its sale or assignment.[25] Section 28 contains rules to determine when a director is interested in securities. Unlike the Stock Exchange rules, a person whose interest arises under a discretionary trust is not deemed to be interested.[26] He is deemed

[19] See Weinberg, *Take-overs and Amalgamations* (2nd ed., 1967), Chap. 23.

[20] On the difference between "purchase" and "subscribe" see *Re V.G.M. Holdings Ltd.* [1942] Ch. 235.

[21] Finance Act 1966, s. 25.

[22] Companies Act 1967, s. 16 (1) (*d*). The new Act does not as such deal with employees' share options. *Cf.* the extensive disclosure provisions of the stock exchanges in this area. *Memoranda of Guidance* (1966), cl. 28.

[23] In particular, in the light of *Hogg* v. *Cramphorn Ltd.* [1967] Ch. 254, it will be improper to issue shares to management primarily with a view to maintaining control, and the directors will have to ensure that an issue is made in the company's interests if litigation is to be avoided.

[24] While shareholders might be able to ascertain the extent to which a director was advantaged, they may still be in partial ignorance of the emoluments of senior officers.

[25] Notification must occur within seven days of the director having knowledge of the event. Failure to comply subjects the director to criminal penalties: Companies Act 1967, s. 27 (8).

[26] *Ibid.* s. 28 (2). *Cf. Admission of Securities to Quotation* (1966), Sched. II, Part B, cl. 15, which requires disclosure where the director, his spouse or infant children are settlor or trustee and in which such persons are beneficiaries or discretionary objects. The Exchange provisions go further in another respect by aggregating as family interests the holdings of companies controlled by the directors' spouse or infant children or trustees.

to be interested in securities if he can control one-third of the voting power in a body corporate which is interested in the securities, or if the directors of such body are accustomed to act under his directions or instructions.[27] He is also deemed to be interested if he enters into a contract for the purchase of the securities or has a right (other than by virtue of an interest under a trust) to call for delivery of securities or to his order, or not being a registered holder, he is entitled to control the exercise of any right so conferred.[28] This latter provision does not, in general, extend to the holding of a proxy to vote at a specified meeting.[29] It may follow that the holder of a proxy to vote at any meeting is deemed to be interested.[30] By section 31, section 27 is extended to the interests of spouses and infant children of directors. By section 29 a register of the information required by section 27 is to be kept by the company, and this will include details not only of dealings but of rights to subscribe granted by the company and the exercise of such rights. These provisions are welcome, if hardly revolutionary.[31] They do not catch all family interests, nor do they force disclosure of share dealings by senior officers who may well have inside information and profit unfairly by it.[32] Section 33 is, however, useful in forcing disclosure of interests by persons holding 10 per cent. or more of the nominal value of quoted share capital carrying unrestricted voting rights. In future it will be more difficult for persons to build up a controlling interest in a company without that fact becoming known.

These matters apart, increased disclosure requirements fall under disclosure in the accounts and under the directors' report. Briefly the Act requires increased disclosure of the affairs of subsidiaries and of the identities and place of incorporation of companies, not being subsidiaries of which it holds 10 per cent. or more of the share capital.[33] The emoluments of the chairman, of directors and of officers are to be disclosed. In the case of directors the obligation is to disclose the numbers of directors receiving remuneration in bands of £2,500. If one director only enjoys emoluments exceeding those of the managing director, this is to be disclosed. In the case of employees, the aggregate of emoluments to be shown are those above £10,000 in bands of £2,500.[34] Where a company carries on more than one class of business, turnover from each class must be specified and an indication given of the extent to which carrying on

[27] Companies Act 1967, s. 28 (3).
[28] *Ibid.* s. 28 (4) (*c*).
[29] *Ibid.* s. 28 (4) (*c*).
[30] See the discussion of this point in Magnus and Estrin, *The Companies Act 1967* at p. 187 *et seq.* The holder of a proxy the date of which is left in blank may, it is suggested, be a party interested.
[31] They do, however, bring the Companies Acts more closely into line with the requirements of the Stock Exchange. See generally *Admission of Securities to Quotation* (1966).
[32] See the criticism at note 15 above
[33] Companies Act 1967, s. 6.
[34] *Ibid.* ss. 6, 8.

the class of business affected the profit or loss of the company. If a company has subsidiaries and submits group accounts it must disclose the proportion of income derived from each class of business which it undertakes.[35] Turnover in relation to business by the company with its subsidiaries or between subsidiaries must be disclosed and also details of indebtedness within the group.[36] Section 9 of and Schedule 2 to the Act extend the disclosure provisions of Schedule 8 to the 1948 Act to include such matters as specification of assets, details of valuation of fixed assets, details of unquoted investments, reserves, overdrafts, loans, and charges for tax, and turnover.[37]

Some of the disclosure requirements contained in sections 15–24 dealing with the directors' report [38] have been dealt with. In addition the sections require, *inter alia*, disclosure of significant charges in the fixed assets of the company or its subsidiaries, the issue of shares and the reasons for making the issue, and details of directors' shareholdings so far as disclosure is required by section 27. The interest of any director in contracts with the company during the year must be disclosed provided that the directors are of opinion that the contract is of significance in relation to the company's business and that the director's interest is material.[39] A similarly drafted provision applies to the disclosure of matters not specifically dealt with so far as they are material to an appreciation of the company's affairs. Information need not be given if the directors are of opinion that disclosure would be harmful to the business of the company or of its subsidiaries.[40] Perhaps the most contentious requirement is that contained in section 19 which requires particulars of political or charitable donations exceeding £50. The wording is not apt to cover all gifts, and, in the light of the importance which the courts attach to ensuring that gifts shall be such as are in the interests of the company (the general body of shareholders), it is surprising that a wider form of words was not used.[41] Were it not that the standard of public life in Britain is sufficiently elevated that no fear of the covert use of patronage at central or local government level need be apprehended, the view

[35] *Ibid.* s. 17 (2).

[36] *Ibid.* s. 17 (2).

[37] The former Sched. 8 is repealed and replaced by Sched. 2 to the 1967 Act, which in turn is in part based on Report of the Company Law Committee, Cmnd. 1749, paras. 851–897 (1962).

[38] See at note 22 above.

[39] Companies Act 1967, s. 16 (1) (*c*). The Report of the Company Law Committee, Cmnd. 1749, para. 95, suggested such a provision in order to bring all material contracts to the notice of shareholders whether or not disclosure had been made to the Board under s. 199 of the 1948 Act. The restriction to material contracts is intended to ease the burden of compliance on directors. The wisdom of such a subjectively worded clause seems questionable.

[40] Companies Act 1967, s. 16 (1) (*f*).

[41] See for example *Parke* v. *Daily News Ltd.* [1962] Ch. 927; *Re Roith (W. and W.) Ltd.* [1967] 1 All E.R. 427, from which it appears that power to make gifts contained in the articles are still subject to the requirement that these must be made in the interests of the company, so limiting the text of any power to make gratuitous payments.

that the section reflects governmental vindictiveness might be tenable.[43] Another contentious provision is section 20 requiring the disclosure of export earnings. Those components firms who export little, but whose products have a substantial impact on the export position, can of course explain the matter in their annual report. But who, in any event, is likely to care? Certainly not the shareholders, unless the company is losing money, or unless, improbably, their social consciences have been stimulated. It may of course be that if the Government intervenes directly by investing in specific companies, such reports might serve as a focal point for action. Otherwise, the requirement is likely to prove one of the Government's damper squibs.

Disclosure apart, the Act does much to rationalise and extend the investigatory and enforcement powers of the Board of Trade. By section 82 it is given powers to investigate the affairs of a director who is believed to be in breach of the insider trading provisions, and also members of a recognised stock exchange and dealers in securities under the Prevention of Fraud (Investment) Act 1958. An investigator may make interim reports to the Board of Trade which can now institute proceedings without reference to the D.P.P. or Lord Advocate. The production of records (including those of subsidiaries) and the attendance of officers and agents of bodies being investigated may be compelled.[43] Such persons are now required to answer and their answers may be given in evidence.[44] The investigator may at any time during his investigation inform the Board of Trade of a suspected criminal offence. The expense provisions have also been altered. The fundamental principle of initial payment from public funds is retained. But a person convicted on a prosecution arising from an investigation, a body corporate which has benefited from proceedings brought in its name, a body corporate dealt with in a report where the inspector was not appointed on the Board's motion, or the applicants for an investigation which was launched on a shareholder application may be liable to pay all or part of the costs.[45] In addition to the above, sections 105–111 contain almost unlimited powers to require the production of company books and papers, to require an explanation of them, and to apply for a warrant to enter and search premises for concealed papers. These may be used for certain criminal and administrative proceedings.[46] The material may be retained for three months. There is no explicit provision enabling the company to have access to them during the period.[47]

[42] See, in particular, H.C.Deb. (5th ser.) Vol. 741, col. 464.

[43] This overcomes the difficulties regarding documents pointed out in Report of the Company Law Committee, Cmnd. 1749, para. 218 (*e*) and (*f*), and as to witnesses in *McClelland, Pope and Langley* v. *Howard, The Times*, March 31, 1966.

[44] Companies Act 1967, s. 89.

[45] *Ibid.* s. 40.

[46] *Ibid.* ss. 109–111.

[47] Compare for example Securities Act 1966 (Ont.), s. 21 (7); Federal Rules of Criminal Procedure (U.S.), r. 16, giving rights of access to seized documents to investigatees.

Perhaps the most interesting and yet disappointing extensions of Board of Trade powers are to be found in sections 85 and 87. Under section 85 (1) the Board is empowered to apply for a winding up where, on a report under section 168 of the 1948 Act, the 1967 Act or sections 18 and 19 of the Protection of Depositors Act 1963, it considers that winding up would be expedient in the public interest. The court may wind up the company if it considers it just and equitable to do so. By section 85 (2) the Board may present a petition for an order under section 210 of the 1948 Act if the business is being conducted in a manner oppressive to any part of its members. The sections as drafted seem certain to give rise to problems of interpretation. As drafted, they are clearly not far-reaching.[48] It would perhaps have been preferable to vest powers in the court to wind up or decree another remedy, simply on the grounds of public interest, relying on the court not to prejudice shareholders unfairly. At present, under the "just and equitable" formula, the courts have decreed a winding up not only in cases of lack of confidence, deadlock and managerial dissention in the "partnership" situation, but also in cases of failure of corporate objects, or where the company is being operated as a fraudulent scheme.[49] It is not clear how far the courts will wish to extend the substratum rule,[50] and relief otherwise in general is narrowly based on the grounds of continuing dishonesty or in other clearly defined fraud situations,[51] Scottish courts and the Privy Council have gone farther to include cases where such conduct as persistent failure to hold shareholders' meetings, failure to keep proper bank accounts, or to have accounts audited, or where accounts are not kept apart,[52] and perhaps abuse of powers by the controllers appear.[53] It may be that the new powers given to the Board will cause the courts to extend the just and equitable ground to those situations.[54] But one may question to what extent the remedy is really desired. These points would not be important were

[48] All else apart, the Report of the Company Law Committee, Cmnd. 1749, paras. 199–206, recommended that references to "winding up" in s. 210 of the Companies Act 1948 be deleted, and that "oppressive" should be liberally defined. It further recommended in para. 212 (*d*) that the court should be empowered to restrain the commission or continuance of any act which would suffice to found a petition under s. 210. These recommendations have not been adequately implemented.

[49] See generally Huberman, "Compulsory Winding Up. The 'Just and Equitable' Rule" (1967) 5 Alberta L.R. 185.

[50] See *Re Surrey Garden Village Trust Ltd.* [1965] 1 W.L.R. 574.

[51] See Huberman, *loc. cit.*, at note 49 above.

[52] *Loch* v. *John Blackwood Ltd.* [1924] A.C. 783; *Baird* v. *Lees*, 1924 S.C. 83. In most such cases, however, the company was closely controlled.

[53] *Thomson* v. *Drysdale*, 1925 S.C. 311.

[54] Naturally, petitions under the former s. 169 (3) rely on such grounds. See *Re Allied Produce Co. Ltd.* [1967] 1 W.L.R. 1469; *Re S.B.A. Properties Ltd.* [1967] 1 W.L.R. 799; *Re Travel and Holiday Clubs Ltd.* [1967] 1 W.L.R. 711. It is perhaps doubtful whether, even were the courts to accord a more liberal construction as to the grounds for the petition, the Board of Trade has the personnel or the budget to deal with any but the most marked cases of fraud.

section 85 (2) not defective. Doubtless the Board of Trade will not be subjected to the *locus standi* requirements of the private litigant.[55] It will, however, have to show "just and equitable" grounds for a winding up in order to secure an order under section 210. The point is, of course, that winding up may not in fact be a just and equitable solution in the interests of shareholders, creditors or the public: an independent power is required. Again, the Act does nothing to make clear what consititutes oppression where there is no independent element of legal impropriety. Lack of wisdom, inefficiency and carelessness do not always suffice.[56] The deficiencies of section 210 have been dealt with elsewhere.[57] It is unfortunate that the new Act perpetuates them and perhaps creates others. This is one of the prices which we pay for hasty and essentially parochial law reform. Reference to the Indian Companies Act, for example, would disclose provisions similar to our own, but enabling the court to make an order on the grounds of both oppression [58] and mismanagement [59] without having to show cause for a winding up.[60] The powers of the court are more extensive including the power to terminate or modify any agreement between the company and its officers upon such terms as the court considers justifiable, to terminate or modify (on conditions) contracts with third parties [61] as well as the like powers which our courts enjoy under section 210, and a power to order interim relief.[62] These provisions might have been employed as a model: there is no indication that their existence was even suspected.

Section 87 confers a new civil right of action on the Board of Trade. If, from any of the sources previously mentioned, it appears to the Board of Trade that any civil proceedings ought to be brought in the name of the company, the Board may bring such proceedings accordingly. This is a partial implementation of a recommendation contained in the Jenkins Report, which was intended to surmount some of the problems posed by the rule in *Foss* v. *Harbottle*.[63] The Report, however, proposed that the court be empowered to authorise proceedings to be brought by applicants against a third party in the name of the company.[64] Again it is questionable how useful this new provision will be. The Board cannot act upon a shareholder's complaint simpliciter, though this could be only a very minor limitation in the hands of a determined Board. It has been suggested that in the light of the Board's past conduct, it is unlikely

[55] See generally Wedderburn (1966) 29 M.L.R. 321.
[56] Compare *Re Harmer* [1959] 1 W.L.R. 62 with *Re Five Minute Car Wash* [1966] 1 All E.R. 242.
[57] By Wedderburn, *loc. cit.*, at note 55 above, and in the Report of the Company Law Committee, Cmnd. 1749, paras. 200–205.
[58] Companies Act, No. 1 of 1956, s. 397.
[59] *Ibid.* s. 398.
[60] *Ibid.* ss. 237, 243.
[61] *Ibid.* s. 402.
[62] *Ibid.* s. 408.
[63] (1843) 2 Hare 461.
[64] Report of the Company Law Committee, Cmnd. 1749, paras. 206, 212 (*e*) (1962).

to play a markedly interventionist role, and this conclusion seems realistic.[65] It is at any rate doubtful whether the Board has the resources to act effectively in the general protection of minority shareholders' rights.[66] The Report's recommendations, adapted in order either to permit shareholders or the Board to commence proceedings, would have been more sensible. Furthermore, the section, while surmounting the former procedural inhibitions, leaves the defects in the substantive law in existence. To some extent, the development of a reasonable body of case-law regarding directoral duties of care and skill was probably inhibited by the rule in *Foss* v. *Harbottle*.[67] The standard of care and skill required is certainly not unduly high.[68] The Act does nothing about this, nor does it seek to attach any duties to the possession and misuse of majority voting powers.[69] Again, models of provisions which if imperfect might have provided some inspiration exist elsewhere.[70] Again, no one appears to have consulted them. We have thus denied ourselves the advantages (and perils) of the derivative suit in favour of an unknown proceeding competent only to a traditionally cautious department of government.[71] This is a curious solution

[65] McEachran, "The Companies Act 1967," 1967 S.L.T. 209.

[66] Pennington, "The Companies Act 1967" (1967) 111 S.J., sees the Board of Trade as prepared to become the shareholders' and creditors' champion. *Sed quaere.*

[67] See Wedderburn [1958] C.L.J. at p. 98. While *Heyting* v. *Dupont* [1964] 1 W.L.R. 843 affirms that there may be cases where directoral misfeasance justifies an exception to the rule in *Foss* v. *Harbottle*, these must necessarily be few. Since misfeasance can generally be ratified (see *Pavlides* v. *Jensen* [1956] Ch. 565), actions all too often can be barred at the procedural stage.

[68] See Menzies, "Company Directors" (1959) 33 A.L.J. 156; Finer, "Company Frauds," *The Accountant*, November 10, 1966. The Report of the Company Law Committee, Cmnd. 1749, did not seek to codify directors' duties but recommended, in paras. 86–87, an essentially declaratory provision relating to their *fiduciary* duties.

[69] The Report's recommendations are in fact rather limited: see para. 99 (*b*)–(*g*). The American rules are much wider, permitting shareholder recovery for misuse of inside information and attaching duties to the sale of control. See *Gerdes* v. *Reynolds*, 30 N.Y.S. 2d 755 (1941); *Insuranshares Corp. of Delaware* v. *Northern Fiscal Corp.*, 35 F.Supp. 22 (1940). See generally *Lattin on Corporations* (1959), pp. 261–274. To attach duties to the sale of control might prove to be a means of surmounting the problems posed by s. 54 of the Companies Act 1948.

[70] Ontario, for example, has suggested a statutory restatement of the duties of directors and the adoption of the derivative suit. In order to compensate for the lack of a contingent fee action which makes the derivative suit so valuable in the United States, it has been suggested that the court should have power to order the company whose rights are being vindicated to pay the costs on an interim basis, leaving the plaintiff to be ultimately accountable. These provisions are not immune from attack. Much will depend on how liberally the standard of care and skill is interpreted by the courts, and the costs provisions could be troublesome. See Interim Report of the Select Committee on Company Law, 1967, 5th Sess., 27th Legislature, 15–16 Eliz. II. In Australia, a statutory standard again in general terms has been adopted, but the courts have taken a rather restrictive view of it. For an example, see the Victorian Companies Act s. 124 (1).

[71] Here one is bound to note the cautious attitude of the Board towards its investigatory powers, and in particular the Morton's fork on which applicants for investigation were all too often impaled. See Report of the Company Law Committee, Cmnd. 1749, paras. 214–217 (1962).

in an Act which seems to proceed in general upon an assumption that shareholder control remains a valid aspiration. It is unlikely that the Board will use its powers except in relatively clear cases of fraud and breach of fiduciary duty, and probably in few of these.[72] One can only hope that subsequent legislation will deal adequately with the subject of directors' and controllers' duties at large.

One may note briefly some provisions relating to partnerships.[73] Banking partnerships may now contain twenty members. Solicitors, accountants and stock exchange members may now form partnerships and limited partnerships without restriction as to numbers.[74]

L. H. LEIGH.

LEASEHOLD REFORM ACT 1967

SINCE 1887 twenty-five Bills have been introduced, unsuccessfully, into Parliament to deal with the enfranchisement of leaseholds.[1] Now an Act has been passed, amidst intense political feeling. Although all parties were agreed that legislation should be introduced to allow to the long leaseholder the right to buy the freehold, their paths diverged widely at that point. The Government's view was that " the basic principle of a reform which will do justice between the parties should be that the freeholder owns the land and the occupying leaseholder is morally entitled to the ownership of the building which has been put on and maintained on the land." [2] The Conservative Party view was that the leaseholder should pay a fair market price for both land and house: " Everybody concerned has regulated his conduct on the basis that, on a known and predetermined date, house and site revert to the landlord. What is proposed is to take the landlord's rights to resume possession of the house and present them to an occupying leaseholder. This is, of course, confiscation. It is not made any the less so by the fact that the leaseholder is also given the right to buy the site." [3]

The Act confers on the tenant of a leasehold house who is occupying it as his residence a right to acquire the freehold or to extend the lease for a further fifty years. He can do this where the tenancy is a long tenancy at a low rent and the rateable value of the house does not exceed £200 or in Greater London £400 and where the tenant has occupied the house as his residence under such a tenancy for five years before he gives notice to enfranchise

[72] McEachran, *loc. cit.*, at note 65 above, refers to s. 87 as a sop to those who would like to see the derivative suit instituted here. Except as an impediment to further progress, it will probably have no greater significance.
[73] Companies Act 1967, s. 119.
[74] *Ibid.* ss. 120, 121.
[1] Mr. Emlyn Hooson, M.P., March 7, 1967, H.C.Deb., Vol. 742, col. 1382.
[2] White Paper on Leasehold Reform in England and Wales, Cmnd. 2916 (1966) para. 2.
[3] Rt. Hon. John Boyd-Carpenter, M.P., *Law Guardian*, No. 24, p. 9.

or extend or for periods amounting to five years within the previous ten years.[4] A house divided horizontally into flats may still be a "house" within the Act but the flats themselves are not "houses"; but a unit in a house divided vertically may be a "house"[5] The Act defines a long tenancy as one granted for a term of years certain exceeding twenty-one years whether or not terminable before that time by notice or re-entry, forfeiture or otherwise[6] and a tenancy is at a low rent at any time when rent is not payable at a yearly rate equal to or more than two-thirds of the rateable value on the date the Act comes into force or on the first day of the term if this is later.[7] The shortness of the "long tenancy" period is one of the most controversial features of the Act. The argument that after, say, ninety-nine years the landlord should not be entitled to the house is understandable on the assumption that the tenant's predecessor bought or built the bricks and mortar in the first place and sold them to the tenant and the landlord has had his ground rent ever since; but the argument that after only twenty-one years the landlord should lose the house completely is unsupportable as the tenant will surely not have paid a bricks and mortar price on taking a mere twenty-one-year term. The tenant who has a term for more than twenty-one years but at a rent of or more than two-thirds of the rateable value cannot enfranchise but is protected by the Rent Act 1965 if the rateable value does not exceed £400 in Greater London or £200 elsewhere.[8] Where a tenant dies and a member of his family becomes the tenant under the same tenancy, then the period when the successor occupied the house as his only or main place of residence can be added to the period when the deceased also occupied it on terms which would have given him a right under section 1 to enfranchise had he lived and this joint period can be used as a qualifying period for the successor's claim to enfranchise.[9]

A tenant who wishes to enfranchise must serve a notice on the landlord.[10] The notice must contain the information listed in clause 6 (1) of Schedule 8 to the Act but by clause 6 (3) the notice is not invalidated by any inaccuracy in the required particulars or any misdescription of the property to which the claim relates; it seems

[4] s. 1 (1) (5). When first drafted the Bill said five years out of the last seven years: s. 1 (1).

[5] s. 2 (1). The forms of notice are prescribed by the Leasehold Reform (Notices) Regulations 1967 (S.I. 1967 No. 1768), which came into operation from January 1, 1968, the date of the commencement of the Act (Leasehold Reform Act 1967 Commencement Order 1967 (S.I. 1967 No. 1896)).

[6] s. 3 (1).

[7] s. 4 (1).

[8] s. 1 of the Rent Act 1967. S. 12 (2) of the Rent Act 1957 applied Part 2 of the Landlord and Tenant Act 1954 to long tenancies not at a low rent but s. 39 (1) of the Leasehold Reform Act 1967 reduced this protection to that originally given by the 1954 Act after applying the increased rateable value limits of the Rent Act 1965.

[9] s. 7 (1).

[10] ss. 8 and 14.

that it is not intended that the notice should be construed as a technical document but presumably to be effective it must be reasonably intelligible to the landlord so that he knows in respect of which property the claim is being made. The court has power under the same clause to allow amendment of the notice if the claim extends to property not properly included with the house or does not extend to property which ought to be included. When the landlord receives such a notice he must indicate to the tenant in the prescribed form whether or not he admits the claim and if he does not admit the claim he must state the grounds on which he relies for not admitting it.[11] A landlord, provided he acquired his interest before February 18, 1966, may validly refuse a request for enfranchisement or for a new lease on the ground that the property or part of it is or will reasonably be required for him for occupation as the only or main residence of the landlord or of a person who is at the time of the application an adult member of the landlord's family [12] or in the case of an application for a renewal of lease the landlord may refuse the grant on the ground that for purposes of redevelopment he proposes to demolish or reconstruct the whole or a substantial part of the house and premises but he must, in effect, buy the bricks and mortar off the tenant.[13]

Where the tenant acquires the freehold the landlord must convey to him (at the tenant's expense [14]) " an estate in fee simple absolute, subject to the tenancy and the tenant's incumbrances, but otherwise free from incumbrances." [15] But burdens originating in tenure and burdens for the upkeep of any land, building, structure, works, ways or watercourses for the benefit of the locality are not to be deemed incumbrances.[16] The conveyance may be so framed as to give the former tenant all such easements and rights over adjoining property as he enjoyed as quasi-easements or quasi-rights during his tenancy but so as to reserve to adjoining properties (which the landlord may still own) such benefits as they enjoyed from the enfranchised premises before enfranchisement.[17] If the mutual easements are not expressly reserved the enfranchiser will have the benefit of the common law rules enunciated in *Wheeldon* v. *Burrows* [18] but by the same rules the grantor will not obtain rights over the property granted unless he expressly reserves them to himself. The grantee may also benefit under section 62 of the Law of Property Act 1925. The landlord may impose restrictive covenants within the limits

[11] cl. 7 (1), Sched. 3.
[12] s. 18 (1). The tenant will be entitled to compensation in accordance with Sched. II to the Act: s. 18 (5); a similar provision applies under s. 17 (3).
[13] s. 17 (1). " The developer would buy back the house at the value of the house. That is plain and straightforward ": Minister of Housing and Local Government on Second Reading, March 7, 1967, H.C.Deb., Vol. 742, col. 1280.
[14] s. 9 (4).
[15] s. 8 (1).
[16] s. 8 (3).
[17] s. 10 (2) (3).
[18] (1879) 12 Ch.D. 31.

laid down in section 10 (4) of the Act, to enhance materially, for example, the value of other premises in which the landlord has an interest whilst not interfering with the reasonable enjoyment of the enfranchised house and premises as they have been enjoyed during the tenancy.[19] The only covenant for title which the enfranchiser can claim is that implied under section 76 (1) of the Law of Property Act 1925 on a sale by a trustee or mortgagee that the vendor personally has not incumbered the premises.[20]

Where the tenant buys the freehold the compensation payable to the landlord under the Act is to be calculated on the assumption that the landlord is selling the house and premises on the open market as a willing seller but subject to a newly granted fifty-year lease which does not contain any right to enfranchise, at the current rent and with the rights and burdens subject to which the tenant will take his conveyance.[21] In other words, the landlord receives no payment for the house and the payment he receives for the land is on the assumption that it is not in his occupation but is yielding a return to him in the form of the rent. If the title is defective the payment must be reduced by the amount of any reduction which might be made on the occasion of a sale in the open market between a willing buyer and a willing seller[22]; the landlord is liable to development levy on any part of his compensation which is attributable to realised development value under the Land Commission Act 1967.[23]

Where the tenant takes an extended fifty-year lease instead of purchasing the freehold the extension is to be on the same terms as the existing tenancy with necessary modifications, if, for example, not all the tenancy in the old lease is to be included in the new, or alterations have been made in the property since the demise was originally made.[24] The rent is to be a ground rent representing the letting value of the site (but without adding anything for the value of the buildings on the site) for the use of which the house and premises have been put since the original tenancy commenced.[24] This ground rent may be revised after twenty-five years.[25]

Any dispute as to the price payable for the freehold or the rent payable on an extended lease and on connected matters is heard by

[19] s. 10 (4) (*c*).

[20] s. 10 (1). The mechanics of enfranchising and extending are set out in the Leasehold Reform (Enfranchisement and Extensions) Regulations 1967 (S.I. 1967 No. 1879).

[21] s. 9 (1). The Minister, Mr. Fred Willey, gave these examples (*inter alia*) of compensation, on the Second Reading: House in South Wales, vacant possession value £1,500, low ground rent, five years of term unexpired, price of enfranchisement about £280. House in London, vacant possession value £7,500, ground rent £20, 21 years unexpired, price of enfranchisement £800: H.C.Deb., Vol. 742, col. 1277.

[22] s. 10 (2).

[23] s. 24 (2).

[24] s. 15 (2) (*a*) (*b*).

[25] *Ibid.* (*d*).

the Lands Tribunal [26] and most other questions are heard by the county court.[27] The High Court may approve a scheme for allowing a landlord to retain powers of management over an estate in order to maintain adequate standards of amenity and regulate redevelopment, if the Minister grants a certificate that in his opinion such powers are likely to be in the general interest.[28]

In 1918 Arnold Bennett wrote of the iniquity of allowing a valuable building, put up by the tenant, to accrue free of charge to the landlord at the end of the term.[29] Now things have changed, there is no legal reason why the tenant could not enfranchise one week and sell for a large sum of money, with vacant possession, the next.[30]

The practical workings of the Act will be watched with interest.

H. W. WILKINSON.

[26] s. 21.
[27] s. 20.
[28] s. 19.
[29] "It was constantly happening that under legal agreements some fine erections put up by another hand came into the absolute possession of Lord Waldo without one halfpenny of expense to Lord Waldo. Now and then a whole street would thus tumble all complete into his hands. The system, most agreeable for Lord Waldo and about a dozen other landlords in London, was called the leasehold system": *The Regent*, p. 168.
[30] But the Minister pointed out that the family which sells its home acquired by enfranchisement will have to obtain another: H.C.Deb., Vol. 742, col. 1288.

REPORTS OF COMMITTEES

Law Reform Committee: Sixteenth Report on Privilege in Civil Proceedings [1]

This is the latest burst in the Law Reform Committee's current salvo at the law of evidence. The hallowed obscurities of the old law are falling like ninepins, or will do so when the various recommendations are implemented.[2] This particular report covers almost the whole spectrum of private privilege, and only excludes Crown privilege because that is to be the subject of a separate report. The one area of private privilege left unexamined is that of self-incrimination in the course of investigations, otherwise than by courts of law, under various statutory provisions.[3] This is a matter for some regret. There is no doubt that the problem is at least as important in practice as some that the Committee has dealt with, and gives rise to concern in those who have to administer these inquiries. The various provisions are also riddled with inconsistencies and would have benefited from some overall scrutiny. Continuation of current *ad hoc* development as envisaged by the Committee [4] can only aggravate the existing anomalies. A further cause for regret is that the Criminal Law Revision Committee has not been infected by the zest of its civil law counterpart. It was never very sensible to divide the reform of the law of evidence between two independent committees; for the committees to have adopted different priorities and different rates of working has not improved matters. The result of this on the reform of the civil law of evidence is manifest in two early paragraphs of the report.[5] Three matters are discussed: on one the Committee has to proceed on the basis of its understanding of the provisional view of the Criminal Law Revision Committee; on another it merely asserts without further comment that the matter is one for the Criminal Law Revision Committee, so presumably not even a provisional view was available on that topic; and on the third it defers to the views expressed by the Criminal Law Revision Committee even though the topic is primarily one of the civil law, even though the Criminal Law Revision Committee recommendations are partial and unsatisfactory, and even though they appear to have been reached without any consultation of the Law Reform Committee.[6] A further overlap noticed by the Committee was with Lord Justice

[1] Cmnd. 8472.
[2] They already appear in the Civil Evidence Bill, cll. 14–17.
[3] These mainly concern company and bankruptcy matters but also extend, *inter alia*, to such topics as elections, explosive substances and land registration.
[4] para. 2.
[5] paras. 9 and 10.
[6] Cmnd. 1977, paras. 200–205. Cl. 27 (1) of the draft Bill.

Winn's Committee on Personal Injuries Litigation on the matter of privilege for medical reports. It is most unsatisfactory that the reform of the law of evidence should be so fragmented; it would be much better if the Law Commission were to be empowered to pick up the pieces and put them together again, preferably in a codified form.

This report is itself inevitably fragmented on account of having to deal with so many distinct topics. It adops a somewhat unorthodox fourfold classification of privileges by reference to their purposes as being against self-incrimination, in aid of litigation, in aid of settlement and reconciliation, and in protection of confidential relationships. As the report makes clear these categories are by no means exclusive; certain communications to solicitors could easily fall into all four. The advantage of this approach is that it makes the broad policy questions of abolition or retention more coherent. A minor disadvantage is that it tends to blur the procedural differences between privileges operating primarily in relation to the discovery of documents, and those operating primarily in relation to the answering of questions in court, for which different procedures may be appropriate. The Committee does, however, explicitly recognise this distinction,[7] and is careful to keep the questions separate.

(a) *Privilege against self-incrimination*

The Committee has accepted the basis of the old law and concerned itself with matters of detail. The reason offered for this is so bizarre as to justify quotation in full [8]:

> "We do not pause to analyse the rationale of the popular sentiment in favour of the existence of the privilege in such a case. We appreciate that the privilege could, on occasion, be used in a way which might defeat the ends of justice and that, as a matter of logic, a strong case can be made in favour of its abolition. But we recognise that the sentiment is widespread and strongly held; the law must, we think, continue to give expression to it: the common law must not lose its common touch."

This is a staggering approach to law reform. Justice and logic are blithely sacrificed on the altar of sentiment, without hesitation, without consideration and without any certainty that the sentiment really exists. It is not obvious how the Committee arrived at the conclusion that it does. It would be interesting to know what techniques were employed to find out. No doubt those who having committed crimes and are now being sued do have a sentiment in favour of not being made to answer questions which may expose them to an adverse judgment in the suit and prosecution for the offence. It is doubtful whether the sentiments of their victims and

[7] para. 4. [8] para. 9.

opponents are so strong in the same direction. And serious though the crime wave may be, there are still substantially more victims than criminals. The Committee admits that the privilege *might on occasion* defeat the ends of justice. It is hard to see how it can ever do anything else. One wonders how far the doctrine will be pressed. If, as the Committee believes, the sentiment is against compulsion to answer or produce where to do so would promote liability to criminal prosecution, it would presumably apply even more strongly to the accused in criminal proceedings. It is to be hoped that the Criminal Law Revision Committee will reject any such view when it gets round to examining these questions. It really is farcical to show such deference to popular sentiment on technical issues like these. What sentiment there is will inevitably be founded on a basis of ignorance of the legal background and social effects of the present rule, and without consideration of all the possible alternatives. It was to examine such issues that specialist committees like the Law Reform Committee were set up. To abase itself before some undetermined and indeterminate popular prejudice is an abdication of its functions. A cynic might suspect such a substitute for argument as being more indicative of the Committee's inarticulate prejudices than of those of the populace.

The changes of detail recommended here involve the abolition of the privilege in respect of the production of title deeds,[9] liability to forfeiture,[10] adultery,[11] and probably criminal charges outside the United Kingdom.[12] The reason for the slight doubt in the latter case is that the Committee seems to envisage a tripartite division into absolute privileges, discretionary privileges and no privilege at all. The line between absolute and discretionary privileges separates cases where the judge cannot compel production or an answer at all from those where he can and upon whatever conditions he thinks fit.[13] In view of the general degree of control that the judge has over proceedings before him the difficulty is to distinguish the latter case from one where there is no privilege at all. The Committee is generally disposed to lean away from absolute privileges and towards discretionary ones, apparently on the basis of the undemonstrated assertion that this will preserve the social values behind the privileges better.[14] In any event incrimination under foreign law is felt to be best left to the discretion of the judge. No change is recommended in relation to liability to penalties so long as penalties remain recoverable in some civil proceedings.[15] The principal addition, or perhaps clarification, of the existing law is to put spouse-incrimination on the same footing

[9] para. 16, Civil Evidence Bill, cl. 16 (1) (*b*).
[10] para. 14, Civil Evidence Bill, cl. 16 (1) (*a*).
[11] para. 12, Civil Evidence Bill, cl. 16 (5).
[12] para. 11, Civil Evidence Bill, cl. 14 (1) (*a*).
[13] para. 1.
[14] *Ibid.*
[15] para. 18.

as self-incrimination, and to make it waivable by the witness. This is apparently regarded as consistent with the popular sentiment justifying retention of the privilege in general. It is not so obviously consistent with the reasoning of paragraph 48 where, in the context of marital communications, the Committee criticises the distinction made between husband-and-wife relations and other family relations which might be equally close. However, this hardly seems a problem of the first magnitude since the Committee cites no case in which the question has arisen, or jurisdiction in which any similar provision has been introduced.

(b) *Privileges in aid of litigation*

It seems quite hopeless to allow lawyers to consider the proper limitations upon the privileges of the legal profession. After the sorry spectacle of the performance of the courts in *Rondel* v. *Worsley*,[16] we now have the Law Reform Committee's approach to legal professional privilege. It is clear, as the Committee claims,[17] that the proper preparation of a case in the context of the adversary system demands some measure of protection. What is depressing is the uncritical and indiscriminate acceptance of the whole corpus of the present rules. Thus all legal advice is equated with legal advice in connection with contemplated litigation on the flimsy, and jurisprudentially unsound, pretext that all legal advice relates to matters ultimately enforceable by litigation.[18] Nor is it clear why the privilege should automatically attach to communications by third parties to legal advisers even when litigation is contemplated, certainly the adversary system does not necessarily demand it as there are common law jurisdictions in which it does not exist. Among the minor recommendations there is one to assimilate patent agents to a greater extent with other legal advisers although no problem seems to have arisen in this context for some years[19]; greater particularity is urged in the preparation of affidavits of privileged documents in certain cases[20]; and the rule protecting documents relevant solely to the party's own case is rightly recommended for abolition.[21] No recommendation is made on the admissibility of improperly obtained privileged documents, apparently because this must wait for the Criminal Law Revision Committee.

(c) *Privileges in aid of settlement and conciliation*

Here the Committee simply recommends the retention of the existing law. The conclusions are once again more convincing than

[16] [1967] 3 All E.R. 993. [17] para. 17.
[18] para. 19.
[19] para. 26, Civil Evidence Bill, cl. 15. It has arisen more recently in the United States: *U.S.* v. *United Shoe Manufacturing Corporation* (1950), 89 F.Supp. 857.
[20] para. 29.
[21] para. 30, Civil Evidence Bill, cl. 16 (2).

the method of arriving at them. Thus in recommending the retention of the existing privilege the Committee accepts the view of the judges in the Probate, Divorce and Admiralty Division, partly apparently because this is more a matter of social policy than of law. Why the judges should be regarded as more competent than the Committee to assess these matters is not explained. It might have been thought that these matters were referred to the Committee just so that more mature consideration could be given to them and in a more informed context than a brief encounter in the court allows. Nevertheless in the absence of any evidence either way it seems plausible enough that candour in negotiating is desirable, and that it might be inhibited if disclosure were permitted against the party's will. The suggestion that conciliation officers should acquire an independent privilege of their own was thankfully rejected despite the support of the President and judges of the Probate, Divorce and Admiralty Division, the National Marriage Guidance Council and the Morton Commission.[22] To have acceded would have been to countenance a complete change in the character of the privilege in that it could no longer be waived by the agreement of the parties. As the Committee points out, the only result can be injustice in keeping from the court impartial evidence on an issue which all parties wish it to determine.

(d) *Privileges in protection of confidential relationships*

The Committee is similarly resolute in rejecting claims for all other confidential relationships, that of spouses in respect of confidential communications,[23] marital intercourse,[24] and adultery,[25] and all other confidential relationships. These forthright, and in some cases very important, recommendations are to be welcomed even though they are slightly weakened by the emphasis on the judges' discretion to allow a refusal to disclose in certain unspecified circumstances.

COLIN TAPPER.

[22] (1956) Cmnd. 9678, paras. 358, 359.
[23] para. 43, Civil Evidence Bill, cl. 16 (3).
[24] para. 44, Civil Evidence Bill, cl. 16 (4).
[25] para. 45, Civil Evidence Bill, cl. 16 (5).

NOTES OF CASES

The Remoteness of Damages in Contract

The rule or rules to determine the remoteness of recoverable damage in contract have occasioned much less conceptual difficulty than the corresponding rules in tort and appear to have operated satisfactorily in practice in the great majority of cases in which they have been relevant, over a very long period. It is therefore somewhat surprising that the House of Lords in *The Heron II* [1] should have considered it necessary or desirable to embark upon an elaborate re-examination and restatement of this branch of the law.

The appellant, Koufos, chartered the *Heron II* to the respondent, C. Czarnikow Ltd., to load sugar at Constanza and to carry it to Basrah or, at the latter's option, to Jeddah. The option was not exercised and the voyage took place to Basrah. It should have taken some twenty days but due to deviations by the appellant, in breach of contract, it took twenty-nine days. In the interval the price of sugar on the Basrah market fell from £82 10s. per ton to £81 2s. 9d. per ton. The difference in price on the cargo of 8,000 tons, amounting in total to £4,010 16s. 8d., was the subject-matter of the action. When the contract was made the respondent intended to sell the sugar on arrival at Basrah, subject to the possibility of shipping the cargo to Jeddah. Although the appellant did not know this he did know that there was a market for sugar at Basrah. He accepted liability for loss equivalent to interest on the value of the cargo for the period of delay but denied liability for the loss in value. The question to be determined therefore was whether or not the appellant shipowner ought to have realised that as a result of any delay in breach of contract on his part the respondent could suffer further loss due to a downward market price fluctuation and, if so, ought he to be held liable for it.

The most obvious obstacle in the path of the respondent was the decision of the Court of Appeal in *The Parana*,[2] in which it was held that loss of market value due to a delay in delivery could not be recovered from a carrier by sea.[3] Their Lordships were unanimous in affirming that this decision laid down no general or special rule of law for the assessment of damages of this nature.[4]

[1] [1967] 3 All E.R. 686; [1967] 3 W.L.R. 1491. Page references below are to the former report.

[2] (1877) 2 P.D. 118; reversing the judgment of the Admiralty Division (1876) 1 P.D. 452.

[3] *The Parana* was followed only in one reported decision, that of the Court of Appeal in *The Notting Hill* (1884) 9 P.D. 105, where the claim was in tort for loss of value due to delay in delivery caused by a collision. It appears, however, to have been applied frequently in unreported cases: see [1966] 2 All E.R. 593 at p. 608, *per* Diplock L.J.

[4] *Dunn* v. *Bucknall Brothers* [1902] 2 K.B. 614, in which the Court of Appeal had stated that *The Parana* laid down no such general rule, was, accordingly, expressly approved.

The Parana aside, *The Heron II*, in consequence, turned upon the application of the ordinary rules as to the remoteness of recoverable damage in contract. There are a number of uncertainties in the law on this point which, assuming an intensive re-examination were justified in this instance, might have been settled. Unfortunately, however, this is not the case.

The test or tests of remoteness of damage in contract

The Heron II shows clearly that the so-called first rule, or first branch of the rule, in *Hadley* v. *Baxendale*,[5] contains a double standard. The two elements can be stated in the form of two separate tests, limiting the damages recoverable for breach of contract to either:

(a) damages which might naturally and usually arise from the breach; or

(b) damages which may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract as being the probable result of its breach.[6]

In test (a) the emphasis is upon the chain of causation resulting from the breach. In test (b) the emphasis is upon the common agreement or understanding of the parties at the time the contract was made as to the scope and extent of their mutual rights and liabilities in the event of breach.[7] In the former the test is essentially objective and it is applied *ex post facto*; in the latter the test is basically subjective, in the sense of being dependent upon findings as to the consensus between the parties, and it is applied *a priori*.

If both of these tests were applied they would in many instances give the same result. Where this is so they can be equated, and either can be further defined in terms of the other. *The Heron II*, however, illustrates circumstances in which their separate application may produce diametrically opposite results. Their Lordships were unanimous in applying, in effect, test (a) above, and deciding that as a question of relative probability the chain of events which gave rise to the loss was not unlikely to occur in the event of

[5] (1854) 9 Exch. 341.

[6] The separation is most clearly expressed by Lord Upjohn at p. 715E, but is implicit in all the other judgments. Donaldson J.'s remarks in *Aruna Mills Ltd.* v. *Dharajmal Gobindram*, 1 W.L.R. 101, following *The Heron II*, show the distinction concisely when he stated, at p. 111, that currency devaluation or appreciation will usually be irrelevant in assessing damages in contract: "*either* because the loss flowing . . . has no causal connection with the breach of contract *or* because such a loss is not within the assumed contemplation of the parties." (Italics added.)

[7] The mutual understanding need not be as self-evident as would, *e.g.*, give rise to the implication of a term of the contract, but may consist, in appropriate circumstances, of common knowledge only. The dicta of Willes J. to the contrary in *British Columbia Saw Mill Co.* v. *Nettleship* (1868) L.R. 3 C.P. 499 at p. 509 were disapproved by Lord Upjohn in *The Heron II* at p. 715G, and this accords with the general view: see *Mayne & McGregor on Damages*, 12th ed., paras. 181–184.

breach, in the form of delay, by the shipowner. The shipowner was therefore held liable.

McNair J. at first instance,[8] and Sellers L.J. in the Court of Appeal,[9] however, applied, or emphasised, test (b), and had no difficulty in holding that the shipowner was not liable for the loss claimed. The facts were, prima facie, strongly in the shipowner's favour, if his actual knowledge and prevision were relevant. When the contract was made the sugar might have been shipped to either Jeddah or Basrah.[10] It appears that as far as the shipowner knew the sugar might have been sold at any time during the voyage, on arrival, or subsequently, or possibly sold pursuant to a long-term contract at a fixed price, or used by the respondent company itself.[11] The cargo was loaded and delivered, in any event, prior to the latest date which, under the contract, it could have been loaded and delivered without breach.[12] Finally, had the parties sought to discover their prospective rights and liabilities at law for loss in the event of delay on the part of the carrier they would almost certainly have been advised that there would be no liability to make good a fall in value.[13]

If a test based on the prevision of the parties is adopted, general rules applicable to all cases of breach can readily be formulated, in terms such as that recovery will be allowed where the prospective liability was clear to both parties at the time the contract was made due to the existence of:

(1) a statutory or other rule of law [14];

(2) an express or implied term of the contract [15];

(3) a custom or usage of their common trade [16];

[8] Unreported, but see p. 689E.

[9] [1966] 2 All E.R. 593, especially at p. 600HL.

[10] *i.e.*, the respondent at that time had no firm intention to sell it in the market at Basrah.

[11] To the extent that these options were open to the respondent it could have made up its mind at any time prior to making the claim for loss of profits as to the most advantageous course to pursue. The appellant had no such choice of options open, nor could he have required the respondent to adopt any course which might have minimised his ultimate loss. Further, there was no mutuality of obligations in the sense that had the appellant's breach resulted, from a favourable upward price movement, in a profit to the respondent, there would be no grounds for any claim against this by the appellant, even to offset other damage. *Cf.* Sellers L.J. [1966] 2 All E.R. 593 at p. 600.

[12] The vessel was nine days late on the voyage. It was loaded, however, nine days earlier than the latest date to which, under the charterparty, the respondent, in appropriate circumstances, had agreed. Further, on arrival a period of 10 days was taken in which to sell the sugar. Had the same time been taken to sell the sugar had it arrived on the due date, part of the actual loss suffered would have been incurred in any event.

[13] On the authority of *The Parana* (*supra*). This was the only consideration which Diplock L.J. in the Court of Appeal said "really gave [him] pause": [1966] 2 All E.R. 593 at p. 608.

[14] *e.g.*, *Sale of Goods Act* 1893, ss. 50 (2), 51 (2), 53 (2) and (3).

[15] See note 7 above.

[16] See note 10 below.

(4) a previous course of business dealings between them [17]; and otherwise only if:

(5) there has been an express communication of the relevant knowledge and intentions of one party to the other prior to or when the contract was made.[18]

The difference between such a formulation and the reasoning of *The Heron II* is in the extent of the knowledge to be imputed to the party in breach. Where the actual prevision of the parties is emphasised imputed knowledge will be very limited. In Lord Wright's words [19]: "As reasonable business men each must be taken to understand the ordinary practices and exigencies of the other's trade or business." [19a] Subjective factors, such as knowledge of particular sub-sales or sub-contracts already made or likely to be made, or an intention to sell at a particular time on a fluctuating market, must be excluded and regarded as "special circumstances," for until communicated they cannot form part of any common understanding between the parties.[20]

The House of Lords in *The Heron II*, however, has held in effect that it is not the prevision of the actual parties to the particular contract which is relevant but the objective standards of a hypothetical reasonable man.[21] Knowledge of the subjective intentions of the respondent charterer was imputed to the appellant. This

[17] It appears that this was the first shipment by the respondent to this market. Had the parties had previous dealings under which the appellant had learned the usual nature of the respondent's business operations the position would, of course, have been otherwise.

[18] *i.e.*, the so-called second rule, or second branch of the rule, in *Hadley* v. *Baxendale* (*supra*). For example, the failure to communicate facts or intentions concerning the use to be made of a mill shaft in *Hadley* v. *Baxendale* (*supra*), and the existence of particularly lucrative dyeing contracts in *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd.* [1949] 1 All E.R. 997, were held to preclude recovery, or full recovery, for the actual loss suffered. On the other hand the fact that a purchaser had communicated his intentions to develop land, in *Cottrill* v. *Steyning and Littlehampton Building Society* [1966] 1 W.L.R. 758, was held to entitle him to recover damages assessed by reference to the loss of profits which both parties knew would be suffered in the event of breach, and hence "contemplated" by them.

[19] *Monarch S.S. Co. Ltd.* v. *A/B Karlshamns* [1949] 1 All E.R. 1 at p. 14.

[19a] *i.e.*, taken literally to mean simply knowledge of existing facts and events likely to occur in the usual course, but not of hypothetical and unexpected possibilities. In its context, however, Lord Wright uses this statement to form the basis of very wide liabilities.

[20] The so-called second rule, or second branch of the rule, in *Hadley* v. *Baxendale* (*supra*) was not relevant in *The Heron II*, for in Lord Upjohn's words, at p. 718E, "It is common ground that the question falls within the first branch of the rule in *Hadley* v. *Baxendale*." But *The Heron II* has made the importance and role of this rule obscure because, on the earlier authorities, knowledge of the respondent charterer's intentions might well have been regarded as "special circumstances" or "special facts" which had to be expressly communicated to the other party to give rise to liability. See note 22 below.

[21] This standard had been foreshadowed, *e.g.*, by Lord du Parcq in *Monarch S.S. Co.* v. *A/B Karlshamns* [1949] 1 All E.R. 1 at p. 19: "Damage arises 'according to the usual course of things' if . . . both parties [to the contract] . . . *must be assumed as reasonable men* to have foreseen such damage as at least a serious possibility." (Italics added.)

can only represent a significant widening of remoteness in contract. At this stage it cannot be predicted how wide the extension will become.[22] Although not stated by their Lordships, the wider test adopted would appear to have made any consideration of the contemplation of the parties irrelevant, except in so far, as occurred in *The Heron II*, lip-service is paid to their prevision by assuming or deeming it to be identical with that of the hypothetical reasonable view, already adopted by the court, as to the relative probability of the occurrence which has caused the loss.[23]

It might have been hoped that the House of Lords would determine in unambiguous terms whether there is one test, or two tests, to ascertain the remoteness of damage in contract,[24] and if the latter to indicate the circumstances appropriate to their separate application. The relationship between any objective test and the need to show the communication of " special facts " might also have been examined. Further, the test, or tests, of remoteness might have been restated.[25] Unfortunately these expectations are unfulfilled.

The distinction between the remoteness of damages in contract and in tort

In *The Heron II* their Lordships were agreed that the extent of damage recoverable in contract is not as wide as it is in tort.[26] No doubt very few circumstances in contract and tort will be directly comparable but the reasoning adopted may be illustrated by the example of nervous shock. In some circumstances, at least, an onlooker at an accident may recover damages in tort for nervous shock.[27] However, it is likely that a party to a contract who suffered a nervous breakdown as a result of a breach by the other party, such as a failure to complete on the due date,

[22] The most striking indication of the extent of possible change is Lord Reid's assertion at p. 695B that " If the tests of ' real danger ' or ' serious possibility ' are in future to be authoritative," and they were in fact approved by a majority of their Lordships in *The Heron II*, " then the *Victoria Laundry* case would indeed be a landmark because it would mean that *Hadley* v. *Baxendale* would be differently decided today. I certainly could not understand any court deciding that, on the information available to the carrier in that case, the stoppage of the mill was neither a serious possibility nor a real danger."

[23] The existence of further possible complications in this branch of the law are indicated by the reservations as to the rules relating to damages in cases involving the sub-sale of goods by Lord Reid at p. 696G and Lord Upjohn at p. 719E; and in cases of non-delivery and delay by carriers by Lord Hodson at p. 700G.

[24] Lords Reid and Morris stated that there was only one rule, while Lords Hodson, Pearce and Upjohn preferred the view that there was one rule with two parts or branches.

[25] The " rule " was restated in full only by Lord Upjohn and then in the form of two alternative tests: see note 6 above.

[26] The contrary has often been stated, and most recently by Lord Denning M.R. in *Cook* v. *S.* [1967] 1 All E.R. 299 at p. 303. The point is discussed fully in *Mayne & McGregor on Damages*, paras. 359–362.

[27] *e.g.*, *Chadwick* v. *British Railways Board* [1967] 1 W.L.R. 912.

could not establish a claim in contract for this kind of damage.[28] Two different reasons could be given for such a decision. First, applying the objective test adopted in *The Heron II* it could be said that there was no recovery because the likelihood of the injured party to such a contract being of such extreme nervous susceptibility was not a serious possibility. Secondly, applying a test based upon the contemplation of the parties, it might be said that such loss was not recoverable because it was not of a kind which the parties had in mind when they made the contract as being likely to result from a breach of its terms.

If an objective test in contract is emphasised it is obviously much more difficult to differentiate between the limits of remoteness in contract and in tort. In theory those limits ought to be identical,[29] " for the principles of causation cannot alter with the boundaries of contract and tort." The test of the contemplation of the parties would, on the other hand, provide a clear basis for distinguishing between liability in contract and in tort in this respect, in the former as being dependent upon the actual prevision of the parties,[30] but in the latter upon the prevision of a hypothetical reasonable man. Their Lordships, however, by adopting an objective probability test of remoteness had to draw a different distinction and did so by stating that the difference is one of degree. The reasonable man does not "contemplate" liabilities in the event of breach of contract which are as extensive as those " foreseen " by the reasonable man in tort. Lords Reid [31] and Upjohn,[32] for this reason, favoured restricting the use of the word " contemplation " to contract only, and reserving " foreseeability " for use in tort, although Lord Upjohn acknowledged that there was no great difference in their meaning.[33] Liability in tort for Lord Reid embraced even " the most unusual case," [34] and for Lord Upjohn it covered all except the most " far-fetched " possibility.[35]

It will seldom, if ever, be necessary to apply this distinction in practice. Even, however, as a concept described comparatively it can have only limited value because a difference of this kind can only be expressed in purely verbal terms. How does one decide in a borderline case whether an event in question was, at the outset,

[28] The dicta of Lord Denning M.R. to the contrary (see note 26 *supra*) may have to be qualified following *The Heron II*. Liability might arise if the party in breach was aware of the other party's condition (*i.e.*, as knowledge of " special facts ") so that there was known to be a possibility that such injury could occur. *Cf.*, *Muhammed Issa el Sheikh Ahmed* v. *Ali* [1947] A.C. 414, where damages resulting in part from impecuniosity were allowed, because they were held to be in the contemplation of the parties.

[29] *Mayne & McGregor on Damages*, 12th ed., para. 117.

[30] Including a limited imputation of knowledge as discussed above.

[31] At 694E, although he had employed this term himself in relation to contract at p. 691G.

[32] At p. 716E.

[33] At p. 716DE.

[34] At p. 692A.

[35] At p. 716A.

"a serious possibility" or "a most unusual case"; or whether it was "not likely to occur" instead of being a "far-fetched" contingency? [36]

The restatement of "such damages as arise naturally"

The greater part of the judgments in *The Heron II* are taken up by a discussion and reformulation of the so-called first rule, or first branch of the rule, in *Hadley* v. *Baxendale*.[37] A considerable number of alternative formulations were considered, many being cited without express approval or disapproval. Their Lordships were united only in the rejection of the phrase "on the cards" as being a suitable term to describe damages which arise "naturally, *i.e.*, according to the usual course of things." [38] On the other hand, "a serious possibility" and "a real danger" were generally approved, except by Lord Reid, who expressly disapproved of these terms. Lord Reid also objected, as did Lord Upjohn with qualifications, to the term "liable to result" although Lord Morris and Lord Hodson expressly approved it. Whatever the value of this discussion it is greatly diminished by the remarkable degree of apparent verbal inconsistency. The usefulness of this exercise was in any event strongly questioned by Lord Morris,[39] who stated that such phrases [40] "... are useful ... but they neither add to the rule nor do they modify it."

Inconsistencies of a similar nature are also to be found in the discussion of the judgment of Asquith L.J. in *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd.*[41] Lords Morris and Pearce approved the whole of the judgment without reserve, the former referring to it as "illuminating" and as "a most valuable analysis" [42] and the latter to its "felicitious language." [43] With much more reserve, Lord Upjohn said that the judgment gave [44] "a colourful interpretation" to the law in *Hadley* v. *Baxendale* and gave his qualified approval.[45] Lord Reid stated that the decision went further than the older authorities and to this extent he expressly disagreed with it.[46] If therefore an agreed clear restatement of the so-called first rule in *Hadley* v. *Baxendale* was required (and, as has been said, Lord Morris at least doubted this), *The Heron II* does not provide it.

[36] Lord Reid engaged in some elementary probability analysis, at pp. 694–695, on this point to reach a conclusion that a one-in-three chance was not too remote in contract, but a one-in-fifty-one chance was. No indication was given, however, of the probability limit in tort.
[37] *Supra.*
[38] The phrase used in *Hadley* v. *Baxendale* (*supra*).
[39] At pp. 697BC, 699B, 699F, 700H.
[40] At p. 700H.
[41] [1949] 2 K.B. 528.
[42] At p. 700H.
[43] At p. 710F.
[44] At p. 716G.
[45] *i.e.*, at p. 717B, on the understanding that no attempt was being made by Asquith L.J. to alter the law.
[46] At p. 694DE.

Measure and remoteness of damage

Not infrequently the terms "remoteness" and "measure" have been used synonymously in this context.[46a] In *The Heron II* this practice is perpetuated. Lord Reid [47] described the question to be decided as one of remoteness, while Lords Hodson [48] and Upjohn [49] referred to it as one of measure. However, if remoteness is defined in terms of the scope or extent of recoverable damage only, and measure in terms of its quantification, there appears to be at least one important point in this area which is as yet unresolved. If, for example, market price fluctuations of unusual magnitude occurred in circumstances such as those before the court in *The Heron II*, would the carrier be liable for the full amount of the loss? There are two possible approaches to this question if the answer is in the negative. It might be regarded as a question of remoteness solely, and a given head of damage, such as loss of profits, divided into recoverable and irrecoverable damages.[50] Alternatively, it might be regarded as a question of measure. Once the head of damage was established the loss of profits recoverable would be measured not by the actual loss but by reference to the fluctuation in price which might have been foreseeable or contemplated.[51]

On the facts of *The Heron II* an intensive survey of the law as to the remoteness of damages in contract hardly appeared to be called for, but assuming it was, there were a number of issues which might have been dealt with and which, had they been satisfactorily resolved, might have made the decision a further milestone in this branch of the law. It seems safe to assume, however, that it will achieve no such status. Nevertheless, although the long-standing existing rules have not been changed, the emphasis has been shifted towards a test of causation at the expense of the prevision of the parties and the ambit of recoverable loss in contract has been extended.

The Heron II is one of a number of decisions in recent years in which the House of Lords has reviewed a branch of the law in very general terms instead of limiting itself solely to deciding the actual point in issue.[52] While their Lordships may have been criticised in the past more often for adopting the latter instead of the former

[46a] See Cheshire and Fifoot, *Law of Contract*, 6th ed., pp. 514–515.

[47] At p. 690B.

[48] At pp. 706A and *cf*, at p. 708E, "questions of remoteness as such do not arise."

[49] At p. 714F.

[50] This occurred in *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd.* (*supra*), where, however, the two types of loss of profits were separately pleaded. *Cf. Cory* v. *Thames Ironworks Co.* (1868) L.R. 3 Q.B. 181.

[51] There is a hint of support for this view in *The Heron II*. Lord Morris, for example, at p. 701H, stated that the difference between the price at the date of actual delivery and the due date was only "prima facie" the measure of damages.

[52] In contract these "reviews" include *Rookes* v. *Barnard* [1964] A.C. 1129 and *Suisse Atlantique* v. *N.V. Rotterdamsche* [1966] 2 All E.R. 61.

course [53] *The Heron II* is perhaps a striking example of the potential disadvantages of this kind of review of the law. Apart from the expense to the parties involved in such lengthy argument [54] the resulting judgments are nevertheless of necessity, still selective in the topics dealt with. The usefulness of the discussion of incidental issues, such as in this case, the comparison between remoteness in contract and in tort, is uncertain. Finally, as *The Heron II* so well illustrates, the possibility of differences in expression, and perhaps in reasoning, between the judgments is such that even the most extensive discussion may yield few, if any, clear new propositions of law.

MURRAY PICKERING.

WIDER STILL AND WIDER MAY POWERS OF APPOINTMENT BE SET OVER the past decade, a distinction has been established between the requirements for certainty of objects of a valid trust to distribute capital and income, and of a valid power of appointment, not coupled with a duty to distribute. In the case of the former, the class of objects must be so defined by the terms of the trust that the whole range of objects is ascertained or capable of ascertainment.[1] For the latter, certainty of objects in this sense is not necessary. If there is a power to appoint amongst a class of objects, but no trust to distribute amongst them in default of appointment, the power is not invalid merely because the instrument conferring it was so worded that no complete list of the objects could be drawn up. In what sense, then, must the objects of such a power be certain?

The test most often cited is that of Harman J. (as he then was) in *Re Gestetner Settlement* [2]:

> "If, therefore, there be no duty to distribute, but only a duty to consider, it does not seem to me that there is any authority binding on me to say that this whole trust is bad. In fact, there is no difficulty, as has been admitted, in ascertaining whether any given postulant is a member of the specified class. Of course, if that could not be ascertained the matter would be quite different, but of John Doe or Richard Roe it can be postulated easily enough whether he is or is not eligible to receive the settlor's bounty. There being no uncertainty in that sense, I am reluctant to introduce a

[53] See generally R. B. Stevens, "The Role of a Final Appeal Court in a Democracy: The House of Lords Today" (1965) 28 M.L.R. 509.

[54] Although the amount involved was relatively small and the issue, basically, was determined by the application of long-established principles, the hearing occupied seven days in the House of Lords.

[1] *I.R.C.* v. *Broadway Cottages Trust* [1955] Ch. 20; *Re Eden* [1957] 1 W.L.R. 788; *Re Sayer Trust* [1957] Ch. 423; *Re Hain's Settlement* [1961] 1 W.L.R. 440; *Re Saxone Shoe Co. Ltd.'s Trust Deed* [1962] 1 W.L.R. 943; *Re Baden's Deed Trusts* [1967] 3 All E.R. 159.

[2] [1953] Ch. 672.

> notion of uncertainty in the other sense, by saying that the trustees must worry their heads to survey the world from China to Peru, when there are perfectly good objects of the class in England. . . . There is no uncertainty in so far as it is quite certain whether particular individuals are objects of the power." [3]

This enunciation of the test of certainty for powers contains an ambiguity, which has been overlooked when the test has been cited. A power is valid if it can be said with certainty, of "any given postulant," that he is a member of the specified class. Does this mean that the power is valid only if it can be said with certainty, of any individual in the world, that he is or is not a member of the specified class? Or is it enough if there can be found one individual who unqestionably comes within the specified class, whilst there might be other John Does or Richard Roes who would be borderline cases? Must the criteria for membership of the class of objects be such that they will apply, or not apply, to any person you care to name? Or are they sufficiently precise if only one person can be found to whom they definitely apply, while there are others to whom they may or may not apply?

The context of Harman J.'s words indicates that it was the former, more stringent, test that he had in mind.[4] And it was in this sense that he applied his own *Gestetner* test in *Re Gresham's Settlement*. There he held invalid for uncertainty a power to appoint, *inter alios*, to "any person in whose house or apartments or in whose company or under whose care or control or by or with whom" a named individual should from time to time be "residing." Harman J. held that, since it was not clear how much residence was involved in "residing," there might be persons of whom it could not be postulated with certainty that they came within or without the specified class, and hence the terms of the power did not satisfy his interpretation of the *Gestetner* test.[5]

[3] *Ibid.* at pp. 688–689. The *Gestetner* test was applied in *Re Coates* [1955] Ch. 495, *per* Roxburgh J. at p. 500; in *Re Gresham's Settlement* [1956] 2 All E.R. 193, *per* Harman J. himself at p. 196; in *Re Sayer*, *supra*, *per* Upjohn J. at pp. 485–486; in *Re Gibbard* [1966] 1 All E.R. 278, *per* Plowman J. at p. 276; in *Re Leek* [1967] 2 All E.R. 1160, *per* Buckley J. at p. 1165; in *Re Gulbenkian's Settlement Trusts* [1967] 3 All E.R. 15, *per* Denning M.R. at p. 18 and *per* Danckwerts L.J. at p. 20.

[4] The objects of the power included "any director or employee or former director or employee or spouse widow or widower of a former director or employee" of certain companies. Harman J. said of *Re Gestetner* in *Re Gresham's Settlement*, *supra*, at p. 196: "That was a case of a very large class, but it was conceded that the class, though large, was not one as to the limits of which there was any doubt: all the people who were in it were not known, but it could be postulated of any given person whether he were or were not in it."

[5] The same more stringent interpretation of the *Gestetner* test seems to have been applied by Roxburgh J. in *Re Coates*, *supra*, where a power of selection in favour of forgotten friends known to the testator's widow was upheld: "all I have to say is that the widow must be able to tell at any moment whether John Doe or Richard Roe was a person within the power, and that if she applied to the court to know whether John Doe or Richard Roe was

However, it is the less stringent of the two alternative interpretations of that test which has been adopted by recent decisions, and this tendency was confirmed by the decision of the Court of Appeal in *Re Gulbenkian*.[6] There the clause creating the power was in terms identical (in all material respects) with those in *Re Gresham's Settlement*. But *Re Gresham's Settlement* was overruled, and the power held valid, because the question whether a person was a member of the specified class was one which could be answered with certainty in particular instances. Denning M.R. expressed the new interpretation of the *Gestetner* test thus[7]: "In all these cases if there is some particular person at hand, of whom you can say that he is fairly and squarely within the class intended to be benefited, then the clause is good. You should not hold it to be bad simply because you can envisage borderline cases in which it would be difficult to say whether or not a person was within the class."

Lord Denning M.R. and Winn L.J.[8] expressly approved the decisions in *Re Gibbard* and *Re Leek*,[9] in which powers to appoint to "old friends" and to persons whom the trustee company should consider to have a "moral claim" upon the settlor were respectively held not to be invalid for uncertainty, by assuming the less stringent interpretation of the *Gestetner* test.[10]

a person within the power, the court, on reading the evidence, would be able to say whether the person was or was not within the power"—*per* Roxburgh J. at p. 500. The more stringent interpretation again seems to have been applied by Upjohn J. in *Re Sayer Trust*, *supra*, where a power to make payments, *inter alios*, to "infant dependants" and "dependent relatives" of the employees and ex-employees of a company was upheld: "Dealing with the class of employees of this very considerable company and exercising ordinary common sense, I think that the committee and, if necessary, the court can come to a conclusion in any given case whether or not a particular propositus is properly described as a 'dependent relative'"—*per* Upjohn J. at p. 486. In neither judgment was there any adversion to the ambiguity of the *Gestetner* test.

[6] [1967] 3 All E.R. 15.

[7] At p. 19.

[8] At pp. 19, 21. Lord Denning M.R. and Winn L J. approved the less stringent interpretation of the *Gestetner* test, but Danckwerts L.J. may have had the more stringent interpretation in mind, although (at p. 20) he differed from Harman J.'s construction in *Re Gresham's Settlement* of the word "residing." None of their Lordships seem to have been aware of the ambiguity inherent in the *Gestetner* test.

[9] *Supra*, note 8.

[10] ". . . is it impossible for any conceivable person who comes along and says 'I am an old friend of the Testator' to show that he is within that description? It does not seem to me that it is"—*per* Plowman J. in *Re Gibbard*, *supra*, at p. 279. "It is only necessary that the qualification to benefit should be sufficiently clearly defined and of such a nature that there is a reasonable possibility of the donee of the discretion selecting a beneficiary of whom it could be clearly said that he at any rate satisfied the qualification no matter how difficult it might be in more marginal cases to decide one way or the other"—*per* Buckley J. in *Re Leek*, *supra*, at p. 1165. By applying the judgments of the Court of Appeal in *Re Allen* [1953] Ch. 810, these decisions equated the requirements for certainty of objects in the case of powers of appointment with the criteria of certainty appropriate to conditions precedent to a gift. In *Re Allen*, a devise to the eldest of the sons of the testator's

How far does the present laxness extend? Would a power to appoint amongst "fanatical fox-hunters" be valid, provided it could be shown that there was one person in the world whose devotion to this pastime undoubtedly merited the description "fanatical?" Would such a person have to be produced, before he could be said to be "at hand" within the above citation from Lord Denning? [11] If so, the donee of a power of appointment may still have to survey the world from China to Peru, before he can conclude that the power granted to him is void for uncertainty of objects.

J. W. HARRIS.

DISMISSAL OF THE PAID UNION OFFICIAL

THE events which brought the parties in *Taylor* v. *National Union of Seamen* [1] before Ungoed-Thomas J. are of some complexity and do not need to be catalogued here: it is sufficient to say that Mr. Taylor, a paid, full-time branch official employed by the National Union of Seamen, was unfortunate enough, in the course of a disagreement between his union and the Shipping Federation, to cross swords on a matter of principle with the union's general secretary, Mr. Scott. The legal interest in the case derives solely from the fact that he thereby lost his job.

The N.U.S. rule book provides that officials can be dismissed at will by the executive council of the union or, as in this case, by the general secretary, and that an official dismissed "for any serious misconduct or actions prejudicial to the interests of the union" shall be ineligible for any "paid official position" and for nomination to the annual general meeting or to the executive council. An official dismissed for any reason is given a right of appeal against his dismissal to the executive council at its next meeting.

Two meetings of the executive council followed Mr. Taylor's dismissal: the first, chaired by the general secretary, purported solely to confirm the dismissal; the second, again chaired by Mr. Scott, heard Mr. Taylor's appeal. The plaintiff was present at the second meeting but not at the first. Mr. Scott had given an account of the dismissal at the first meeting (which the court subsequently held to be inaccurate in certain respects), and this account was read out in full at the second meeting. Mr. Taylor was then given an opportunity to make a statement and, after answering questions

nephew" who shall be a member of the Church of England and an adherent to the doctrine of that Church" was upheld, because, although these words entailed questions of degree, a particular claimant might be able to show that they undoubtedly applied to him.

[11] Plowman J. requires the court to ask whether it is "impossible" to find an object who would come within the power; Buckley J. says there must be a "reasonable possibility" of finding such an object: *supra*, note 9.

[1] [1967] 1 All E.R. 767.

put to him by members of the council, he left the meeting. After his withdrawal but before any decision was reached, Mr. Scott addressed the meeting at some length on matters which in Ungoed-Thomas J.'s view were " completely outside the charge against him (the plaintiff) such as that he had communist associations." The decision of the council was that the dismissal should stand.

A few months later, having been refused nomination to the post of general secretary made vacant by the death of Mr. Scott, Mr. Taylor found himself another job outside the union, and it was not until some five years had gone by that the matter reached the High Court. The plaintiff there claimed (a) a declaration that his purported dismissal by Mr. Scott was wrongful and ought to be set aside; (b) a declaration that the purported decision of the executive council dismissing his appeal was *ultra vires*, unlawful, null and void; and (c) damages for wrongful dismissal.[2] An alternative claim was later introduced by amendment, for a declaration that the union should not be entitled to treat the plaintiff as if he had been dismissed for misconduct. Mr. Taylor based his claims on two arguments: that the meeting which he attended was not the " first meeting " of the council, and that in any event the second meeting, which was of a semi-judicial nature, had not observed the rules of natural justice. The first argument was rejected, and the case thus turns on the question of natural justice. The union conceded that if the rules of natural justice were applicable here as to an expulsion from membership and if, as was contended, the general secretary had acted as both prosecutor and judge, then such rules had not been observed.

It is clear that the courts will readily apply natural justice rules to straightforward expulsions from union membership,[3] but it is equally clear that they will not normally be applied to dismissals from employment.[4] Taylor was both a member and an employee of the union. He did not, as a result of the hearing, lose his union ticket, but he did lose both his job and certain rights which normally attach to membership.[5] Prima facie, therefore, Taylor would appear to have no right to challenge the validity or fairness of the council's decision to uphold his dismissal. Yet the learned judge was able to grant the relief sought in the alternative claim and declare that the plaintiff should be relieved of the disabilities imposed on him as a result of his dismissal. He did this by distinguishing Taylor's dismissal from his loss of membership

[2] The court subsequently ordered an inquiry as to damages.

[3] Though all cases are not straightforward—see *Faramus* v. *Film Artistes' Association* [1963] 2 Q.B. 527—and it may be that the rules apply only when a hearing is provided for in the rule book.

[4] See, for instance, *Ridge* v. *Baldwin* [1964] A.C. 40 at p. 65.

[5] See also *Simms and Others* v. *Plumbing Trades Union, The Times*, April 5, 1967, in which the right to hold office rather than membership was lost. Plowman J. found that the rules of natural justice had not been observed, and granted an *ex parte* injunction to restrain the defendant union from carrying out their resolution.

rights, and arguing that in his membership capacity alone he was entitled to be heard in accordance with the rules of natural justice. These rules had not been observed in so far as the general secretary had assumed the dual roles of prosecutor and judge.

Though one may be in agreement with Ungoed-Thomas J. on the final outcome of the case, there is nevertheless something a little suspect about his reasoning. The second hearing was after all, so far as the people involved in it were concerned, about Mr. Taylor's dismissal, not about the loss of membership rights consequent upon it. The judge himself seems more persuaded by the fact that it would have been " wholly unreal " to make a declaration that the plaintiff had never been validly dismissed in the face of his employment elsewhere for the past five years than by the unquestionable authorities he gives to support the contention that a dismissal, whether wrongful or not, terminates the contract of employment. In effect he appears to be refusing the equitable remedy of a declaration in the form at first claimed by the plaintiff on equitable grounds alone, and not because the exercise of a discretion has crystallised into a rule that declarations can never be granted in ordinary employment cases, particularly where such a remedy would if observed amount to specific performance. This interpretation of his judgment is borne out by the extensive reference he makes to the judgment of Lord Morris of Borth-y-Gest in *Francis* v. *Municipal Councillors of Kuala Lumpur* [•]: Lord Morris clearly considers that in the case before him there is a discretionary rather than an absolute bar on remedies other than damages for breach of an employment contract. Would it therefore have made a difference if Mr. Taylor had reached the court before he had found another job? No doubt Ungoed-Thomas J. is right to stress the importance to the plaintiff of his full membership rights, affecting as they do his future livelihood, but his present livelihood could scarcely have been considered less important.

Furthermore, it has never to the writer's knowledge been successfully argued that because an employee loses certain advantages upon dismissal, often no less tangible than those lost by Mr. Taylor, such as the security he has been led to expect his job would give him, or the rights he acquires through continuity of service to seniority, to a redundancy payment or to the protection of the Contracts of Employment Act, he should be entitled to any remedy other than damages where the dismissal is wrongful, or even in some cases to any increase in those damages. In the present case, Taylor was given both a declaration that he should not be treated as if he had been dismissed and, presumably, damages for wrongful dismissal, though the dismissal was wrongful only in that the council did not observe the rules of natural justice in respect of his loss of membership rights.

[•] [1962] 3 All E.R. 635 at p. 637.

Is there any other way in which the same decision could have been reached—is there, in other words, any possibility of challenging the rule that damages are the only appropriate remedy for a dismissed employee? As already mentioned, Lord Morris in *Francis* v. *Municipal Councillors of Kuala Lumpur* [7] seems to say that there is no such rule but a discretion. *Francis* is one of a fairly large group of cases, of which *Vine* v. *National Dock Labour Board* [8] is perhaps the best known, in which the courts have granted declarations that dismissals from employment have been invalid by reason of a breach of natural justice rules, or that they have been *ultra vires* and therefore void.[9] All have in common the fact that the employer concerned is a public or statutory body. In effect such decisions may involve a reinstatement, though legally it is not necessary to reinstate an employee who has never been validly dismissed, and though a declaration can be refused on the equitable grounds that reinstatement is no longer possible or desirable.[10] These cases have in the past been grouped together as an aspect of public rather than employment law, but the distinction seems false, particularly in view of the fact that the distinction between public and private employment grows increasingly obscure.[11] Even if a satisfactory dividing line were to be found it would seem to have little practical value; it may be historically true to say that the courts have taken upon themselves supervisory powers over the expenditure of public money and the running of public services, particularly where the authority to do either arises from a statute, but this is not to say that the private sector of employment is not on occasion in equal need of supervision.

Furthermore, there does not seem to be any compelling reason why the principles applied in the public sector should not also be applied to certain private employment cases such as the present. In *McClelland* v. *Northern Ireland General Health Services Board* [12] it was held to be *ultra vires* the health authority to dismiss the plaintiff on any but a number of stipulated grounds. Since the doctrine of *ultra vires* has a somewhat wider application in trade union law than it does in relation to companies,[13] this same reason-

[7] See above.

[8] [1957] A.C. 488.

[9] See, for instance, *McClelland* v. *Northern Ireland General Health Services Board* [1957] 1 W.L.R. 594. It seems possible to draw a fairly clear line between the natural justice dismissal cases and those concerning *ultra vires*. *Ridge* v. *Baldwin* makes it clear that natural justice rules will be implied only for the protection of holders of public office, but the *ultra vires* concept would appear to have a wider application—Vine and McClelland can hardly be called holders of public office. If, of course, the rules of natural justice were expressly incorporated into the authorising statute or instrument, then their breach would also be *ultra vires* the employer.

[10] As in *Francis's* case, *supra*.

[11] See for instance *Vidyodaya University Council* v. *Silva* [1965] 1 W.L.R. 77.

[12] *Supra*.

[13] The doctrine is not confined to acts outside the declared or statutory *objects* of the union, but extends to admission to and expulsion from the union: see, for instance, *Martin* v. *S.T.G.W.U.* [1952] 1 All E.R. 691; *Spring* v. *N.A.S.D.S.* [1956] 1 W.L.R. 585.

ing could possibly be applied where a union rule book specifies the terms of employment and dismissal for union officials. It is not clear from the report what arguments were advanced in *Taylor's* case to support the claim that the council's decision to dismiss was "*ultra vires*, unlawful, null and void." A declaration to that effect was not granted, possibly because the learned judge decided against the plaintiff on the question whether the hearing was the council's "next meeting." It is also possible, however, that the plaintiff sought to have the council's decision declared null and void on the grounds that the council had contravened the rules of natural justice.[14] There is at present considerable doubt about the legal status of these rules: whether or not they depend for their very existence on a "contractual nexus," albeit totally unrelated in subject-matter; whether they are implied terms of an implied or real contract, or implied solely on the grounds of public policy; whether their breach renders a decision void or only voidable.[15] The efficacy of a declaration to avoid a voidable decision is also not established.[16] Given, however, that the rules are implied contractually, it may be possible to argue that in a case like *Taylor* a breach of these rules is conduct *ultra vires* the union rule book express and implied, and that therefore the decision is void. The doubts about nullity and mere voidability would thereby be resolved, and a declaration that the decision was void would again, in effect, amount to a reinstatement. The same result would of course be achieved if the rule-book contract incorporated the rules of natural justice in express terms. But the courts would be most unlikely to extend this line of reasoning to cover individual employment contracts which specify the grounds on which, or the manner in which, an employee may be dismissed: in the absence of any corporate element, the only remedy would be for breach.

The argument from *ultra vires* can thus be seen to apply to only a very limited range of cases, and the question remains—is the declaratory judgment (and thus in some cases reinstatement) one which is generally appropriate in the employment context? The National Joint Advisory Council Committee report on dismissal procedures would seem to indicate that, whatever the law's view on the matter, reinstatement is a practical remedy of considerable importance. But for a decision on the larger policy issue concerning the extent to which the law should intervene we must apparently await the report of the Royal Commission on Trade Unions and Employers' Associations.[17]

JUDITH REID.

[14] The declaration granted did not involve a ruling that the decision was null and void, but one that removed some of the consequences of the dismissal —an excellent illustration of the flexibility of this remedy.

[15] In *Ridge* v. *Baldwin* the House of Lords divided 3:2 against voidability.

[16] See I. Zamir, *The Declaratory Judgment*, pp. 156–157.

[17] See note on National Joint Advisory Council's Committee on Dismissal Procedure, (1968) 31 M.L.R. 64.

ENGLISH ADOPTION OF FOREIGN CHILDREN

TEXTBOOK writers are unanimous that the English courts have jurisdiction to make an adoption order in favour of a child domiciled abroad but resident in England.[1] There is no agreement whether the child's *lex domicilii* should be taken into account by an English court in the exercise of its adoption jurisdiction.[2] The authors of this controversy, by switching attention from a pure jurisdictional issue to a question of a choice-of-law rule, have left unresolved the more acute issue whether the English court has jurisdiction to make an adoption order involving the extinction of the natural parents' rights vested under a foreign law. And the judgment of Goff J. in *Re B (S.), an Infant*,[3] in deciding on a compromise between the academic protagonists, has similarly ducked the issue of jurisdiction over foreign-domiciled parents.

An application for an adoption order affects permanently the status not only of the child who is to be adopted and that of the prospective adopters but also that of its legitimate, and even illegitimate, parents by extinguishing the latter's parental rights, duties, obligations and liabilities, and transferring them to adopters. Section 1 of the Adoption Act 1958 is explicit in conferring on the English courts jurisdiction in respect of the first two of the three parties—the child and its adopters—whose status would be materially altered by an adoption order. The applicants must be domiciled in England or Scotland[4] and the child need only be resident here. The Act is wholly silent about jurisdiction over the parents, save that no order can be made without either the parents' consent or the exercise of the court's limited power to dispense with a consent which is being withheld.[5] It cannot be gainsaid that natural parents are strictly party to the adoption proceedings since they must be made respondents to the application for the adoption order.[6]

Although severe inroads have been made, both by the legislature and the courts, upon the principle of domiciliary dominance in matters of status, it is an admitted and basic feature of status that, fixed by the *lex domicilii*, it has universality.[7] Vested rights of a person domiciled outside England could, prima facie, be

1 Dicey and Morris, *The Conflict of Laws*, 8th ed., Rule 67, pp. 457–458; Cheshire, *Private International Law*, 7th ed., pp. 380–381.

2 Dicey and Morris, *op. cit.*, p. 458; Kahn-Freund, *Growth of Internationalism in English Private International Law*, pp. 62–66; Cheshire, *op. cit.*, p. 381; Graveson (1959) 8 I.C.L.Q. 8–10; Unger, "Use and Abuse of Statutes in the Conflict of Laws" (1967) 83 L.Q.R. 427, 435.

3 [1967] 3 W.L.R. 1488; [1967] 3 All E.R. 629.

4 Applicants resident here but domiciled abroad can apply for a provisional adoption order under the Adoption Act 1958, s. 59.

5 Unger, *op. cit.*, p. 438, suggests that "the legislator had dealt with the jurisdiction of the English courts explicitly and comprehensively . . ."

6 r. 16 (*a*), the Adoption (High Court) Rules 1959, as amended by the Adoption (High Court) (Amendment) Rules 1965. Similar rules are provided for in adoption applications in the county court and the magistrates' court.

7 *Re Luck's Settlement Trusts* [1940] Ch. 864 at p. 864, *per* Scott L.J.

tampered with or extinguished only if the U.K. Parliament specifically permitted such interference. Is there anything compelling in the Adoption Act 1958 which would displace this basic rule of jurisdiction? It is, to say the least, unsatisfactory that in a case in which this issue was directly in point the problem was shirked.[8]

A little girl, born in England in January 1962 of an English mother and a Spanish father, was eight days after birth placed with the prospective adopters who had cared for her ever since that time. The mother, who in 1959 had married the father, domiciled throughout in Spain, left her husband and returned to England in the summer of 1961 when pregnant, leaving an elder child in Spain. When the applicants in 1968 applied to the Sheffield County Court for an adoption order they were met with an implacable refusal by the father to consent; and, given the state of the law, Judge Ould felt quite unable to dispense with that consent on the ground that it was being unreasonably withheld, a view firmly endorsed by the Court of Appeal. Subsequently, the child's natural mother obtained a divorce in England, together with an order for the child's custody. With the natural mother's domicile thus changed to England, the applicants reapplied for an adoption order by originating summons in the Chancery Division, and Pennycuick J. gave leave to proceed under rule 6 of the Adoption (High Court) Rules 1959. Before Goff J. they sought—successfully—to have the father's consent dispensed with on the ground that he had persistently failed without reasonable cause to discharge the obligations of a parent.

Goff J. declined to decide the point whether the child's domicile was now English, but proceeded on the assumption that the child was still domiciled in Spain.[9] He went on to consider what, if any, impact Spanish law would have on the exercise of the English court's adoption jurisdiction. Switching from jurisdictional to choice-of-laws rules, the learned judge found that he could not ignore altogether the effect of an English adoption order in Spain. Spurning alternatively academic blandishments in favour of totally ignoring the *lex domicilii* [10] or in favour of applying the domiciliary law qualified only by the considerations of the child's welfare,[11] Goff J. held that the *lex domicilii* was indeed a factor—an important one—in considering whether the proposed adoption would be for the welfare of the infant.[12]

[8] The point was raised, but did not in the circumstances require judicial decision, in two cases: *Re L–S, An Infant*, May 6, 1968, Bar Library transcript, No. 124/1968, of which the case before Goff J. in *Re B (S.), an Infant, supra*, was the sequel, and *Re T. M. H., An Infant, The Times*, July 6 and 27, 1968. In *Re R. (Adoption)* [1967] 1 W.L.R. 84, parents of an adopted person who were domiciled in an Eastern European country were not made respondents to the English adoption application. Buckley J. held that the rule as to making parents parties to the application was procedural and not jurisdictional; he dispensed with their consent on the grounds that they could not be found.

[9] At p. 1442D.

[10] Dicey, *op. cit.*, p. 858, and Kahn-Freund, *op. cit.*, pp. 64–66.

[11] Graveson (1959) 8 I.C.L.Q. 8–10.

[12] At p. 1444.

While one would not quarrel with the import of the international effects of an English adoption upon the exercise of the discretionary power to make an adoption order, nevertheless the same considerations cannot apply to the rights of the natural parent. In providing for a consent to be dispensed with, the law deliberately excluded any question of the child's welfare (except as to a judgment whether the non-consenting parent had taken account of the effect on the child of a removal from the former home to a new environment).[13] How then is it possible to displace the domiciliary principle of jurisdiction over a natural parent, on the ground that adoption is so bound up with a child's welfare that the courts of the child's residence can oust this basic jurisdictional rule? The courts, in fact, should be more (not less) circumspect in exercising powers which have the effect of extinguishing valuable rights than it might be in conferring beneficial rights on strangers to the child.

With great respect to Goff J., it is very doubtful whether the learned judge had any jurisdiction to dispense with the natural father's consent. His attempt to gloss over this jurisdictional difficulty by concentrating on the jurisdictional and choice-of-law rules *vis-à-vis* a foreign-domiciled child stems from the legislature's failure to anticipate the increasingly international flavour of family relationships. Any new adoption legislation (which surely cannot be long delayed) should provide a scheme of jurisdictional and choice-of-law rules in adoption, in which it may be right to equate the court's jurisdiction over the rights of all natural parents, whether those rights are vested under English law or any foreign law.[14]

L. J. BLOM-COOPER.

SUPPLY OF MATERIALS AND IMPLIED TERMS

THE Court of Appeal has, in *Prior* v. *McManus Childs Ltd.*[1] and *Gloucester County Council* v. *Richardson*,[2] failed to clarify the law governing contracts to do work and supply materials. A contract for work and materials, or for skill and labour as it is sometimes called, resembles a contract for the sale of goods in that an end result of performance of the contract is that the property in goods passes from one party to the other. It differs in that the substance of the contract is the exercise of skill and labour and that it is only ancillary to that that the property in the materials used passes.[3]

[13] See Naomi Michaels, "Dangers of a Change of Parentage in Custody and Adoption Cases" (1967) 83 L.Q.R. 547.

[14] See the European Convention on the Adoption of Children signed at Strasbourg on April 24, 1967, by the member states of the Council of Europe: see also notes on the Convention at (1966) 82 L.Q.R. 470 and (1967) 83 L.Q.R. 331.

[1] [1967] 3 All E.R. 451.

[2] [1967] 3 All E.R. 458.

[3] *Robinson* v. *Graves* [1935] 1 K.B. 579 (C.A.).

An important question in such contracts is whether the person doing the work has any responsibility for the materials which he supplies. Clearly he may be liable under an express term of the contract: thus the liability of a shoe repairer who contracts to fix leather soles and in fact supplies plastic is evident, and for present purposes it is unimportant whether this is regarded as an express term, or as an implied term that the materials supplied will correspond with their description.[4] But are there any implied terms of fitness for purpose or merchantable quality, comparable to the implied terms in contracts for the sale of goods under section 14 (1) and (2) of the Sale of Goods Act 1893? It is clear that the Sale of Goods Act as such does not apply to such contracts, but what does the common law say?

Although the distinction between contracts of sale of goods and other contracts under which goods are supplied dates from the Statute of Frauds 1677, the implied terms in both types of contract were imprecise before the Sale of Goods Act and no clear difference emerges in the earlier cases. In *Francis* v. *Cockerell*,[5] indeed, Kelly C.B. referred (in a case of work and labour) to a general proposition of law applicable to all contracts where "one man engages with another to supply him with a particular article or thing" that the article or thing should be reasonably fit for its purpose, but none of the cases he relied on were sale cases; the later case of *Randall* v. *Newson* [6] recognised a difference in the implied terms in contracts of sale and other contracts, and is interesting for its attempt (probably historically accurate) to subsume the implied terms of merchantable quality and fitness for purpose as particular adaptations of the "fundamental undertaking" of correspondence with description.[7]

More recently the courts have recognised that there is sufficient similarity between the two types of contract to justify analogous terms. In *G. H. Myers & Co.* v. *Brent Cross Service Co.*[8] du Parcq J. thought it would be very surprising and remarkable if there were great differences and stated that "a person contracting to do work and supply materials warrants that the materials which he uses will be of good quality and reasonably fit for the purpose for which he is using them, unless the circumstances of the contract are such as to exclude any such warranty." Scott L.J. in *Samuels* v. *Davis* [9] said that it was "a matter of legal indifference" whether a dentist's contract to make false teeth was one of sale of goods or of service to do work and supply materials. In *Stewart* v. *Reavell's Garage* [10] Sellers J. spelled out a car repairer's implied warranty of

[4] *Cf. Andrews* v. *Singer* [1934] 1 K.B. 17 (C.A.).
[5] (1870) L.R. 5 Q.B. 501 at p. 503.
[6] (1877) 2 Q.B.D. 102 (C.A.).
[7] *Ibid.* at p. 109, *per* Brett J.A.
[8] [1934] 1 K.B. 46 at pp. 53 and 55 (D.C.).
[9] [1943] K.B. 526 at p. 527 (C.A.).
[10] [1952] 2 Q.B. 545 at p. 549 (Q.B.D.).

fitness for purpose in terms closely founded on section 14 (1) of the Sale of Goods Act.

All this might lead the unsuspecting to assume that in contracts for work and materials there is an implied term of fitness for purpose and another of merchantable quality for which section 14 (1) and (2) respectively of the Sale of Goods Act, based fairly closely on the common law of sale, might be used as precedents. But this is not so. In *Myers* v. *Brent Cross Service Co.*,[11] a new trial was ordered to see whether the car-owner had expressly instructed the garage to repair the engine with parts obtained from the car manufacturer because, said the Divisional Court, if this were so it would show circumstances apt to exclude the warranty. If this had been a sale of goods such facts might exclude any reliance on the seller's skill or judgment and negative the condition of fitness for purpose, but they would not exclude the condition of merchantable quality under section 14 (2) of the Sale of Goods Act: the result would therefore have been different.

The distinction appears again in the most recent cases. In *Prior* v. *McManus Childs Ltd.*[12] a builder employed a sub-contractor to supply and fix " Somerset 18 " tiles to roofs. This the sub-contractor did, but owing to what was probably a manufacturing fault (the manufacturer of the tiles was not before the court) the tiles were unsatisfactory and needed replacing before the roofs became watertight. The sub-contractor, although not at fault, was held liable. Sellers L.J. held that it was his duty to supply tiles of the description " Somerset 18 "—" not merely tiles sold by that name but tiles which corresponded to the standard which that description entailed. They were not of that quality . . ." Thus the terms of correspondence with description and of merchantable quality appear to be essentially the same; and he pointed out that there was no need to rely on a warranty of fitness for a known purpose. But whereas in contracts of sale exclusion clauses are strictly construed, both Sellers and Russell L.JJ. accepted that in contracts for work and materials " the circumstances of the contract " [13] might exclude warranties.[14]

Although there were no such circumstances in that case, the majority [15] found circumstances excluding warranties in *Gloucester County Council* v. *Richardson*.[16] The council employed a builder to erect an extension to Stroud Technical College. The contract required the builder to provide precast concrete columns to be obtained from a supplier nominated by the council. The concrete columns were defective (probably as a result of a manufacturing

[11] [1964] 1 K.B. 46.
[12] [1967] 3 All E.R. 451 (C.A.). The appeal arose from third party proceedings.
[13] The expression used by du Parcq J. in *Myers* v. *Brent Cross Service Co.*, above.
[14] See, in particular, Russell L.J. [1967] 3 All E.R. at p. 457.
[15] Davies and Russell L.JJ., Sellers L.J. dissenting.
[16] [1967] 3 All E.R. 458 (C.A.).

fault) and the council claimed damages.[17] Sellers L.J. would have found the builder liable under implied warranties that the materials supplied would be (a) of good quality and (b) reasonably fit for their purpose. Davies L.J. found no implied warranty as there was no reliance on the builder's skill and judgment. Russell L.J. held that " in a contract for work and materials there are implied warranties analogous to those implied by section 14 (1) and (2) of the Sale of Goods Act 1893." Prima facie the builder would be responsible for the undetectable defects in the columns, but the circumstances showed that there was no implied warranty as to undetectable defects and that the council had taken on themselves the risk of such defects. The circumstances on which he relied included a contractual provision specifying not only the supplier from whom the builder must obtain the columns but also the terms on which they must obtain them, terms which limited the supplier's liability to the builder without similarly limiting the builder's liability to the council.

In both cases leave to appeal to the House of Lords has been given. If the effect of contracts for work and materials and of contracts of sale of goods is brought closer together the law would not only be simpler, it would also be more just. As du Parcq J. pointed out,[18] it is strange that if spare parts are ordered, to be fixed by the buyer, the supplier is liable for defects, but that if the supplier is to fix them himself he may not be liable. The distinction (if it exists) is not easy to justify.

AUBREY L. DIAMOND.

[17] This is an over-simplification of facts which turned *inter alia* on rights under the R.I.B.A. contract.

[18] In *Myers* v. *Brent Cross Service Co.* [1934] 1 K.B. 46 at p. 58.

REVIEWS

CHANGING CONCEPTS OF CRIME AND ITS TREATMENT. Edited and introduced by HUGH J. KLARE [Oxford: Pergamon Press. 1966. ix and 186 pp. 50s. net.]

THIS book is a symposium edited by Mr. Klare, the indefatigable secretary of the Howard League, to mark the centenary of this important and valuable penal reform society. As Rt. Hon. Kenneth Younger says in his Foreword, the transformation of the penal system "has been slow and is still incomplete but the Howard League can claim an honourable place among those who, over the generations, have kept up the momentum of reform, often in the face of public prejudice and inertia. It has been the League's business to goad and criticise and, even when reforms have been accepted by governments, to press that they should come faster and go further."

Part of the secret of its success has been the willingness to embrace the findings of modern criminology and incorporate them in its armoury of argument and persuasion. This volume is an example of the extent to which the Howard League can muster and deploy the immensely exciting resources of modern scientific inquiry. Sociologists, psychiatrists, psychologists and penal administrators join in contributing to the Symposium, and Hugh Klare writes a useful Introduction. It might seem invidious to select any particular papers for comment, but to this reviewer three stand out as of special interest.

First, there is Professor Marvin Wolfgang's most valuable paper on Race and Crime, which is based on the author's previous American publication on this subject, which is not readily available here. American criminologists have, as Dr. Mannheim once pointed out, contributed greatly to the dispelling of prejudice by investigating the racial factor in crime. Such studies as Professor Wolfgang's show us the the path we may need to tread in relation to the subject in Britain. Statements such as the following are pregnant with social significance: "The decision that someone has committed a crime may depend less on the individual's behaviour than on police policy, referral practices and treatment resources in a community."

Secondly, the lawyer may be interested in Dr. Gibbens' historical account of the development of forensic psychiatry. His survey shows how the old battles over the M'Naghten Rules have given place to new doubts about the necessity for a concept of criminal responsibility, stimulated by Lady Wootton. To the psychiatrist, the questions seem philosophical rather than practical. He wants to know what ought to happen to the offender as a result of his act—what category of treatment does he need? Dr. Gibbens does not appear to favour the recent proposals for replacing juvenile courts with family councils, on the ground that although they may be designed to increase parental responsibility, their effect may well be the opposite, if one can judge by Scandinavian experience. Forensic psychiatry is in a state of consolidation in Britain today, says Dr. Gibbens. "There are no recent radical advances in treatment." The relations between the prison medical service and the national health service are being improved. The whole question of the custody and security of mental patients and the theoretical basis for detention, whether for treatment or to protect the public, require constant re-examination. "Responsibility," which earlier the author dismissed as a peripheral matter, is recognised in the end to exert a great influence and to be a matter of central importance. Several irritating errors have crept into Dr. Gibbens' paper, which should not have passed unnoticed.

The third paper which struck the reviewer as being of great interest is that by Dr. Charlotte Banks, giving an account of the elaborate researches which

have been carried out by a large research team from University College, London, of which she is the mainspring, into the comparative aspects of Borstal, prison and detention centres for young adolescents. This is a solid research paper of considerable value which will be cited long after some of the other contributions are forgotten.

Finally, may we express regret that there is no contribution dealing directly with the system of criminal justice in this Symposium. Surely the law relating to the apprehension, trial and conviction of offenders and the choice of sentence deserved some consideration. It is true that Dr. Morris as a sociologist and Mr. Fairn as a penal administrator pass comments on the law's values and those of the general public, and judicial attitudes. But we could have done with a more detailed look at the system.

J. E. HALL WILLIAMS.

SOME PROBLEMS OF THE CONSTITUTION. By GEOFFREY MARSHALL and G. C. MOODIE. Fourth Edition. [London: Hutchinson University Library. 1967. 172 pp. (incl. tables and index). 11s. 6d. Paperback; 27s. 6d. Hardback.]

BRIEFLY, yet with full argument and illustration, the authors have welded black-letter law and political reality into a fair and convincing account of ministers' constitutional position. As a students' introduction to the sources, exercise and control of executive power in the United Kingdom this book, although backed by relevant history, is thoroughly of the 1960s. It was first brought out in 1959, and the frequency of reference to later events in the 1967 edition is evidence of the rapidity with which, at least in detail and emphasis, the United Kingdom constitution changes. It is not only that Blackstone is out of date (in some respects that was true when he wrote), but so also, in one degree or another, is everyone who has written since. Most prime ministers contribute, if they stay in office for an appreciable period, to the evolution of ministerial status. Other persons and processes also ensure development. For this reason *Marshall and Moodie* too will pay the penalty for being up to date by ceasing to be.

Some Problems of the Constitution is not entirely a book of problems. There is enough description and explanation to make the problems readily comprehensible by the beginner, just as they are fascinating to the old hand at constitutional law. But it is primarily a collection of problems on ministers' powers and ministerial responsibility as they present themselves now. Since they are stated as problems, and are worth stating as problems, they have no authoritative solutions. A law book which gets away from a recitation and criticism of what has already been decided is welcome; and where the primary concern of the book is with what has not yet been decided it is most refreshing.

It would be a pity to suggest that any section of the book is better than another by making specific reference. Nevertheless, on the old post-*Dicey* favourite of the relations between conventions and litigation it is interesting to notice how the question of the sanction for the binding effect of conventions has been of relatively little practical importance compared with the importance of the existence of the convention of ministerial responsibility to Parliament in persuading judges towards a restrictive view of the *ultra vires* rule.

For the person who begins with *Marshall and Moodie* and wants to go further there is a useful bibliography.

L. A. SHERIDAN.

EQUITY AND THE LAW OF TRUSTS. By PHILLIP H. PETTIT. [London: Butterworths. 1966. CXX and 491 pp. £8 15s.]

STUDENTS and teachers of the law of trusts who have struggled with one or other of the standard texts on the subject will welcome the fact that the law

publishers are at last providing new alternatives. No longer must the student be told that his choice lies between a text that is accurate but indigestibly terse, another that is stylish but uninformative, and a third that rambles waywardly on. Professor Pettit's new text is a well-balanced, detailed and, given the subject matter, lucid account of the areas of the law commonly included in a course on Equity. The title, for all its euphony, reverses the order and emphasis of the work. The book begins with a description of the trust and the law relating to trustees. This comprises a major part of the whole, but equitable remedies and the "doctrines" are also included. Such parts of equity as covenants and mortgages are sensibly left to books on land law, and assignments of choses in action to those on contract. The administration of estates is not separately treated, which may somewhat reduce the usefulness of the book for those preparing for Bar Examinations. Many will be delighted to note the omission of the maxims of equity; for too long they have bored the bright and ensnared the stupid.

The treatment of materials, particularly the extensive reference to cases, is sufficiently detailed to make the work a useful guide to practitioners as well as students. Indeed, in some sections the wealth of authorities cited is more than most students can be expected to absorb, and careful guidance from teachers will be necessary. The book contains useful discussion of some areas of the law currently being developed. In particular it is welcome to find extended treatment of the apportionment of matrimonial property by variation of the rules relating to resulting trusts and the presumption of advancement. But at several points at which matters of principle are currently under debate the treatment is either too cautious or too brief to allow the reader to appreciate the real issues in dispute. For instance, the new infraction of equity's requirement of completion or consideration to constitute a trust, which is implicit in Buckley J.'s application of the rule in *Strong* v. *Bird* by analogy to the facts of *Re Rall's Will Trusts* ([1963] 3 All E.R. 940), receives less attention than it deserves. The doctrinal nature of the secret trust also receives somewhat constricted treatment; but perhaps that is inevitable from an author who is prepared to accept that the magic formula "the trust arises dehors the will," has some real meaning. This avoids any need to discuss whether it is justifiable to sidestep the policy of the Wills Act, s. 9, in the interests of secrecy. There is no attempt to explain what is at stake in regarding the constructive trust as substantive or as remedial. In line with this, the chapter on constructive trusts makes no reference to the duty of a fiduciary not to make a profit; the matter is dealt with only under the duties of trustees. There is no discussion of the extent to which a proprietary remedy is available to recover such a profit. Indeed, while the distinction between implied and constructive trusts is drawn when classifying trusts, it is not always made clear to which category the examples of each belong.

There are other relatively minor matters of law on which one might take issue with the author but it would create a false impression of the author's very considerable achievement to carp at length on isolated points of doubt or difference. The real limitation of the book lies not in its analysis of legal principles but in its failure to provide adequate background material which would help the student to understand the kinds of transaction about which he has to learn, and to help him to evaluate the conflicts of policy which the law is seeking to resolve. In the opening chapter there is a brief attempt to indicate some of the multifarious uses of the trust at the present day, taking as a particular instance the unit trust. But otherwise this sort of descriptive material rarely occurs. For instance, the description of trustees' statutory powers of investment lists the categories of security included in the various ranges laid down in the Trustee Investment Act 1961, but it is simply assumed that the reader appreciates such vital matters as the value of the new power to invest in safe equities, and the reason why certain narrower range investments do not require advice. One can hazard that a large proportion of the

next generation of law students who use this book are going solemnly to learn this list by rote without any clear appreciation of its significance. The same might be said of the administrative powers and duties of the Charity Commissioners and charity trustees. The legal provisions of the Charities Act 1960, are duly set out and will no doubt be learnt parrot-fashion when a question on the subject is expected in an examination. But there is very little which would suggest to the student why it is that when the legislature has intervened in the area of private charity it has generally been to secure more efficient and useful administration of charitable funds. The important review of the practical problems of the administration of charities in the Nathan Report gets only an occasional glance. A good deal about the operation of the legal provisions resulting from that Report can be gathered from the Annual Reports of the Charity Commissioners. These go unmentioned. In both the definition of charitable purposes and in matters of administration, the issues of policy increasingly involve the interrelation of private and public welfare organisations. Yet the reader unaware of the problems would find little in this book to direct his attention to them. If he starts reading the chapter on charitable trusts, instead of any attempt to assess the social significance of organisations that are legal charities, he is at once embroiled in the judicial interpretation of that grudging concession to practicalities, the Charitable Trusts (Validation) Act 1954.

In other words, Professor Pettit has provided a textbook that gives a clear and well-ordered account of materials currently considered to be the proper fodder for the embryo conveyancer and Chancery practitioner. He has contributed little that will help the student to see the functional importance of the law he is obliged to study. Capturing the attention of the present-day student, who frequently lacks any business or practical legal experience, is a special problem of the property law teacher. In the law of trusts the general principles are often derived from legal decisions upon atypical or recondite transactions. It is essential that the teacher should do what he can to make his student aware of the practical uses and problems of the trust concept. Nor can a textbook writer fairly pass the burden onto the shoulders of individual teachers. For one thing there are the many students who take correspondence courses; for another, there must be a certain proportion of teachers who stick grimly to what knowledge they themselves can glean from the legal texts. It would not take a great deal of extra space for Professor Pettit in his second edition to add a useful amount of practical description to his lengthy legal analysis. It would be most welcome; for certainly his book exhibits the sort of staying power that ought to keep it among the pacemakers on the track for some time to come.

W. R. CORNISH.

THE SOUTH AFRICAN LAW OF TRUSTS. By A. M. HONORÉ. [South Africa: Juta & Co.; London: Sweet & Maxwell. 1966. lii and 512 pp. £9 12s. net.]

THE institution of the trust was introduced into South Africa by the British settlers in the Cape in the early nineteenth century, but although in this sense the South African trust concept finds its origins in English law it is a mistake to suppose it is closely modelled on our own system. In the very broadest sense it may be, but the variations between the English and South African trust are so considerable as to make it certain that anyone who has a preconceived notion of their similarity will be trapped into some dreadful mistakes. The reason the two institutions have developed so dissimilarly is substantially the result of the Roman-Dutch influence on the South African law of trusts and also in part the fact that South Africa never wholeheartedly accepted the English influence as entirely as other settlements. Suffice to say

that, although there are obvious English and Roman-Dutch influences, the South African trust has become a unique institution with some remarkable characteristics.

Under South African law a trust can be created only by an actual transfer of assets or by a binding obligation to transfer. It cannot be created by a declaration of trust [*Honoré*, pp. 99–100]. Although it is common for the assets to be transferred to the trustee or for the creator of the trust to bind himself to transfer the assets to the trustee, it is possible for the ownership of assets to be vested in the beneficiary. The so-called *bewind* trust is discussed by Mr. Honoré at pp. 191–192. The nearest analogy to this in English law would be the procedure under the Settled Land Act, but even here the temptation is to over-stress the similarity. There is some similarity to English law in that the founder of the trust may be the beneficiary and the trustee may also be a beneficiary, but the trustee cannot be a sole beneficiary.

Perhaps the most striking difference between the two laws is that the beneficiary under South African law where the trustee owns the trust assets is in a far less privileged position than he is in English Law. He has no right to the trust property to the exclusion of other creditors in the event of the trustee's bankruptcy. There is no concept of equitable ownership of the assets and no right to trace them. He is in fact like any other unsecured creditor. The peculiar distinction between legal and equitable estates which is so fruitful in English law has no application in the South African law of trusts. Indeed the beneficiary in some respects is worse off than an unsecured creditor. Apart from statutory exceptions and registered trusts of immovables, there is no segregation of the trust and private assets of the trustee so far as his private creditors are concerned, but there is so far as the trust beneficiary and other trust creditors are concerned. Whereas his private creditors can execute against the trust property and the trustee's private assets the trust creditors must sue "the trustee in his capacity as trustee and are confined to executing against the trust property. Only if the trustee has been guilty of a personal default such as a breach of trust, may the beneficiary sue him in his personal capacity," [see *Honoré*, p. 19 and pp. 885 *et seq.*] Since he cannot normally trace trust property the beneficiary's remedy against a third party who acquires trust property with notice that the acquisition is in breach of trust is likely to be in delict [*Honoré*, p. 890]. However this relative disadvantage of the beneficiary is considerably less when the trust property is vested in him under a *bewind* trust. Where ownership of the property is vested in the beneficiary he can generally vindicate it. It may well be that English law does go too far in the protection of the beneficiary and the South African rules are a healthy reaction against them, particularly when it is borne in mind that the beneficiary is more specifically protected against the trustee's insolvency in the case of registered trusts of immovables, other registered trusts where the trustee is a financial institution, and the trust accounts of attorneys.

An unsatisfactory feature of South African law is the absence of the institution of joint tenancy. The trustee's rights pass to his executor, though his heirs and legatees have no claim. The executor then must needs transfer them to the surviving or new trustees [*Honoré*, pp. 16–17].

Linguistic confusion awaits the English student of South African law. The English "administrator" would be called an executor in South African law (more specifically he is an executor dative as distinct from an executor testamentary). The South African "administrator" corresponds more to our trustee.

There is no resulting trust in South African law, instead, in cases where we have conceived of the resulting trust as a corrective institution, in South African law a personal remedy of the *condictio* will frequently lie to prevent the unjust enrichment. The influence of Roman law is striking here. The proper remedy against the trustee to recover surplus funds undisposed of under the trust is the *condictio sine causa*. To recover trust funds in the

event of a failure of the consideration for the trust it is the *condictio ob rem dati*. Where the purpose of the trust is unlawful the remedy, if any, will be the *condictio ob turpem causam* or the *condictio ob iniustam causam*.

Great credit is owed to the author for picking his way through a confusing and involved subject with great clarity and intelligence. The English reader who comes to the book with knowledge of the English law of trusts may find things strange initially but with reasonable diligence he should be able to thread his way through the subject with this book. Within its compass is a wealth of knowledge and a deal of scholarship. The author is not afraid to be critical of South African law (the use of discretionary trusts to evade estate duty is one area of criticism which might sound familiar to the English reader) or to comment where he finds it superior to English law. He himself is well qualified to take comparative points and does so to advantage.

The book is well written and nicely produced and the reviewer has few criticisms to offer. The alphabetical list of statutes is not as good as a chronological list. At p. 9 the author refers to the donations tax of 1955. A footnote refers to Act 48 of 1955, Part VI. To check for further references for this one cannot run chronologically through the statute list but must pick out and dismiss the Estate Duty Act 1955 [p. xlii], it is misprinted "1945" on page xliii, and eventually find the Income Tax Act 1955 [p. xliv].

There are a small number of misprints among the references and occasionally the sub-headings are confusing. Thus § 29 titled "Trust and Debt" refers to an overlap between that section and the preceding one, "since mandate and agency give rise to a relationship of debtor and creditor." In fact the comparison of trusts with mandate and agency is not the previous § 28, "Competence to dispose for estate duty purposes." The discussion of the subject covers the previous twelve sections, §§ 16–28.

An interesting aspect of the book is the inclusion of separate chapters on Taxation of Trusts, Trusts in the Conflict of Laws and Unit Trusts, matters which are thinly dealt with in most English books.

J. A. ANDREWS.

AN INTRODUCTION TO ENGLISH CANON LAW. By E. GARTH MOORE. [London: Clarendon Law Series. 1967. xv and 176 pp. (including index). 28s. net.]

MOST lawyers not actively involved in the life of the Church of England will have little more than a general familiarity with the legal structure of the Established Church even though, as such, it is part of the law of England. Except in so far as it impinges on constitutional law and real property, English Canon Law remains one of the more abstruse specialisms. This latest addition to the Clarendon Law Series will enable churchmen and lawyers to acquire an intelligent general grasp of the legal basis for matters of much more central importance to the life and mission of the Church of England. Great attention is paid to the legal framework established in the sixteenth and seventeenth centuries for Anglican doctrine and worship. There are also chapters on the law of ecclesiastical property and persons, as well as on the old and the new legislative and judicial institutions which, in true English fashion, co-exist in harmony.

Although many aspects of English Canon Law have been overhauled in the last forty years by the Measures of the Church Assembly, perhaps the most interesting development for lawyers is the new system of courts to try theological offences which was set up by the Ecclesiastical Jurisdiction Measure 1963. This created the Court of Ecclesiastical Causes Reserved as a new court of trial (instead of the Consistory Court) with an appeal to a Commission of Review appointed by the Crown instead of the usual appeal to the Court of Arches (or to the Chancery Court of York) with a final appeal to the Judicial

Committee of the Privy Council. These new courts are composed of a carefully balanced blend of bishops and communicant judges assisted, in the case of the Court of Ecclesiastical Causes Reserved, by eminent theologians and liturgiologists. The old structure of consistory court, provincial court, and Privy Council is, of course, retained for pure conduct cases involving charges against morals or discipline, but any ecclesiastical offence involving a point of doctrine, ritual or ceremonial is now excluded from the jurisdiction of the ordinary ecclesiastical courts. Under the Ecclesiastical Jurisdiction Measure 1968, there has been a less sweeping change in the civil (or "faculty") jurisdiction in ecclesiastical causes. While the consistory court keeps its first instance jurisdiction unimpaired, on appeal the same distinction is again made between ordinary disputes and those involving doctrine, ritual and ceremonial. These latter cases go to the new Court of Ecclesiastical Causes Reserved, with a possible further appeal to a Commission of Review, in place of the traditional hierarchy of provincial court and Privy Council. This latter is still kept for ordinary faculty cases.

With irenic sympathy and inward understanding, Mr. Moore examines the unfortunate conflicts between High and Low Churchmen which have brought about this change in legal machinery. The spate of litigation about liturgical practices which followed upon the Oxford Movement and the Evangelical revival in the nineteenth century has continued into this century. He traces the historical and theological reasons for this unhappy struggle which threatened the Anglican settlement. He notes that judges in the Privy Council were for the most part far from High and were often deficient in liturgical and theological scholarship. This resulted in a series of inconsistent and unsatisfactory decisions in cases where High Churchmen were always on the defensive. The end result of these unedifying proceedings was one of general embarrassment and a tacit understanding on all sides to ignore the law entirely. There is a clear parallel here to other areas of English life where, through bitter experience, it was found either that the courts were best avoided altogether (as in industrial law) or that a new system of specialised tribunals had to be created to by-pass the courts (as in administrative law). The Church of England has now gone through both these phases.

The author, while accepting the need to place theological and liturgical disputes in more specialised hands, is somewhat critical of the top-heavy and unwieldy machinery which the Ecclesiastical Jurisdiction Measure has created. This is particularly the case in "criminal" proceedings before the new courts. There are two stages of preliminary investigation, first by the diocesan bishop and then before a very weighty Committee,[1] before a complaint can ever reach the Court of Ecclesiastical Causes Reserved for trial. Even if this Committee finds that there is a prima facie case against the accused cleric,[2] it may still decide to dismiss the case either because the offence charged is too trivial to warrant further proceedings, or because there are extenuating circumstances, or because further proceedings are not thought to be in the interests of the Church of England. The author observes a little acidly that the last-mentioned ground is "a novel provision in legal proceedings." If a case goes through all the possible stages it will occupy in a judicial capacity the following important and busy men: six diocesan bishops, three law lords, two judges of Supreme Court standing, two diocesan chancellors, not to mention the theological and liturgical assessors and the bishop who first considered the complaint. After all this the maximum penalty which may be imposed is a monition, which is defined as an order to do or not to do a specified act. The author does not tell us what happens if the order is not obeyed, but these new courts have no power to impose the more serious ecclesiastical penalties (deprivation or other

[1] Consisting of another diocesan bishop, two members of the Lower House of Convocation in the Province and two diocesan chancellors).

[2] It is no longer the practice to proceed against laymen. The only effective penalty against them—excommunication—has been abolished.

lesser forms of disqualification) which are available to the consistory court in ordinary conduct cases. It is consequently very difficult not to agree with him that this elaborate structure with its formidable array of judicial and episcopal personnel provides "a very heavy sledge hammer to crack a possibly insignificant nut." Mr. Moore goes so far as to doubt whether any attempt will be made to use the new procedure "more than the one time necessary to convince even its authors of its unserviceability for many of the purposes for which it was designed." He tells us that he made many criticisms of the new system, during the debates on the 1968 Measure in the Church Assembly, some of which were accepted. Those rejected he now repeats, leaving the reader to judge of their validity. These criticisms notwithstanding, the desire of churchmen to avoid a repetition of the ritual prosecutions of the nineteenth century and their dislike of the decisions on such questions made by the Judicial Committee clearly justify the new system, as the author admits. Thus neither the Court of Ecclesiastical Causes Reserved nor the Commission of Review is to be bound by any past Privy Council decision on matters of doctrine, ritual or ceremonial. Even if the new machinery is somewhat clumsy and expensive, it may still, despite these defects, serve its main object of making litigation on such matters a last resort reserved for a flagrant outrage upon the tolerance of the most tolerant of Churches. The partisan and fanatical may be able to raise points of doctrine and liturgy in faculty proceedings, but as these are civil they entail no penalty for the incumbent. Moreover, the result of an appeal will be heard by those more attuned to the mind of the Church than the Judicial Committee has shown itself to be.

It would be difficult to imagine anyone better qualified to write an introduction to English Canon Law than the learned author of this well-justified addition to the Clarendon Law Series. It is written in a style at once lucid, elegant and lapidary. Mr. Moore displays a fine sense of irony when the occasion demands, but he is more usually irenic in touching upon the controversial areas of doctrine and worship in the Church of England. Although on any point of doubt he gives his opinion as to the probable legal position, he succeeds, so far as an outsider can judge, in fulfilling a promise in the preface "to present controversial matters factually and impartially." He maintains a proper lawyerly detachment from the heat of theological debate.

It is perhaps his deep love of his own communion which leads the author to depart a little from these high standards in the chapter on "Dispensation." He expresses the view that on the matter of divorce, the Orthodox Church comes "perilously near" to departing from the divine law, and then implies that in the Roman Church the Papacy has made a regular practice of so doing. At least as a gesture to oecumenism, it could have been conceded that there can be more than one view as to what the precepts of the divine law entail. A more usual and justifiable charge against the contemporary Roman Church is that it overstates the immutable and eternal element in the moral law. Would that both the Anglican and Roman Churches could add the useful Orthodox notion of *δικονομία* to their canonical systems.

The text and footnotes appear to be remarkably free from typographical or other errors. The only misprints that the reviewer could spot were one in a footnote cross-reference on page 185 and the others as to the date of the Ecclesiastical Jurisdiction Measure, 1963 (No. 1), which is wrongly dated "1964" on page 181, page 185 and again on page 187, but nowhere else.

A. J. Boyle.

Das Minderheitsvotum des überstimmten Richters. By Wolfgang Heyde. [Bielefeld: Verlag Ernst und Werner Gieseking. 1966. 174 pp. DM27.]

This interesting and well-written monograph on dissenting judgments is topical in this country. As the author was able to note before going to

press, last year witnessed a relevant reform. Breaking with a tradition going back at least to the seventeenth century and reaffirmed in 1878, after a disclosure of dissent by Kelly C.B.,[1] the Judicial Committee of the Privy Council introduced the possibility of expressing dissenting opinions. Moreover, the practice is closely related to the problems of the legal profession and the judges' attitude to legislation, now again under public discussion.

In this book the author describes in detail the practice in the common law countries and in Germany, and the literature on the subject. He also contributes many interesting observations on the practice in other countries, ranging from the strict single-judgment principle over the secretly or confidentially filed dissenting opinion to the public discussion of the verdict.

A valuable result of the author's historical research is the finding that the German tradition of the anonymous single judgment is not nearly as old or unchallenged as commonly supposed. Before the foundation of the German Empire in 1871 the practice of disclosing dissent, though not necessarily in open court, was established in south Germany, particularly in democratic Baden. It was Prussia's influence that led to the single judgment becoming the German norm—and the forces for and against were pretty evenly matched; the material *Reichstag* committee vote in favour of the single judgment showed a majority of only one.

When, after 1945, the courts were again debated in the Federal German Parliament the struggle for dissenting judgments was resumed, but—with an exception relating to the Constitutional Court—the wave in favour broke on the rock of the by then firmly established tradition—some eighty years, compared with many hundred years in England.

Possibly, although the author does not say so, the opponents were loath to adopt the practice of the countries of the victors, a consideration that did not deter Japan, which, according to the author, after the war exchanged the German practice adopted in the nineteenth century for that of the U.S.A. The main argument against the dissenting judgments in Germany is that they are calculated to impair the authority of the court. It is interesting to note[2] that the single-opinion rule of the Judicial Committee was supported mainly on the ground that it adds moral weight to a tribunal which must give the law to many different races in various stages of civilisation. Possibly the change in 1966 was prompted by the progress of the colonies to independence, which is incompatible with the old paternalistic approach, and called for a uniform court practice at home and for the Commonwealth.

The author is clearly in favour of the common law practice, that is, of dissenting judgments and of concurring judgments arrived at by different reasoning. After reviewing a few well-chosen English cases he finds that this

[1] Holdsworth, *A History of English Law*, Vol. 1, p. 519; Vol. 15, p. 488. The Order in Council of February 4, 1878 (O.C. 698), a photostat copy of which the reviewer was able to obtain by courtesy of the Registrar of the Privy Council, refers in the preamble to, among other things, "certain Orders to be observed in Assemblies of Council, passed in the reign of King Charles I, and bearing the date at Whitehall, February 20, 1627, which Orders are entered and recorded in the Council Books, that ' . . . when the business is carried according to the most voices, no publication is afterwards to be made by any man how the particular voices and opinions went.' " It is then declared and ordered "that the ancient rule and practice of the Privy Council be strictly adhered to, respected, and observed, in all appeals, causes, or matters referred by Her Majesty to the Judicial Committee of the Privy Council, or to any other Committee or Assembly of the Privy Council, and that no disclosure be made touching the matters treated of in Council, and no publication made by any man how the particular voices and opinions went. . . ." This Order, as far as it relates to the Judicial Committee, was repealed by the Judicial Committee (Dissenting Opinions) Order 1966 (S.I., p. 1100).

[2] Holdsworth, *loc. cit.*, p. 519, quoting Selborne, *Judicial Procedure*, pp. 54–63.

practice has promoted the evolution of the law and led to a fairer interpretation of statute-law—an opinion that will surprise some English critics of the English judiciary. On the other hand, the author might have mentioned that even under the single-judgment principle German judges have found it possible to create new rules, some of them bold and far-reaching and sometimes calculated to impair the foreseeability of the result of litigation. Nor did the author indicate that the veil of secrecy regarding opinions of judges can be lifted. This was done in a curious fashion in a recent judgment of the Hamburg Court of Appeal.[3] It rejects a certain interpretation of a provision of the commercial code and continues: "To the extent to which the chairman of this division of the Court, in his commentary on German shipping law, had upheld this view to the contrary it is hereby expressly withdrawn." The decision goes on to refer expressly to the commentary by Senatspräsident Gramm.

While there can be no doubt that the common law practice of concurring judgments based on different reasoning enlivens the law and leads to some judges becoming respected public figures, thus enhancing general respect for the law, it has at least one consequence that is not wholly advantageous, another point which the author does not make. Where the majority or all members of the court decide for one party for different reasons the *ratio decidendi* may be impossible to discover, so that the value of the case as a precedent is reduced and the law remains uncertain. Two House of Lords decisions, for instance, bear this out: *Bell* v. *Lever Brothers*[4] and *Suisse Atlantique* v. *Rotterdamsche Kolen Centrale*.[5] The difficulty of discovering the *ratio* of such decisions actually contributes to a weakening of the principle of precedents, which some may consider not entirely harmful.

Where he talks about precedents the author would seem to make too much of the distinction between the interpretation of statute-law and judge-made law. In England, in particular where legislative draftsmanship is often open to severe criticism, the practice of separate judgments is calculated to promote the understanding equally of common law and statute-law. Their interpretation requires an equal degree of creativeness. The explanation of statutes, in particular, is assisted by the non-stereotyped, often literary and felicitous mode of expression of some eminent judges, which is stimulated by the preservation of their individuality and recognised by the inclusion of English judgments in anthologies of English prose. Blom-Cooper's *The Law as Literature* and *The Language and the Law* and Megarry's *Miscellany-at-Law* are unthinkable where judgments are anonymous. In this connection the author might also have brought out a little more strongly the scholarship of British and U.S. judgments, which is stimulated by the separate opinion practice.[6]

This practice can bear fruit only where judges are of a high calibre—a consideration not without its bearing on Germany, where the more important civil cases are tried by three judges, who are career judges appointed at a comparatively early age without previous experience.

O. C. GILES.

THE PROCEDURAL STATUS OF THE INDIVIDUAL BEFORE INTERNATIONAL AND SUPRANATIONAL TRIBUNALS. By W. PAUL GORMLEY. [The Hague: Nijhoff. 1966. 206 pp.]

THIS book is a further contribution to the extensive literature on the international protection of human rights. It is often said that for such protection

[3] (December 10, 1964.) *Monatsschrift für Deutsches Recht*, Vol. 19, p. 210.
[4] [1932] A.C. 161.
[5] [1966] 2 All E.R. 61.
[6] See especially E. J. Cohn, in *Festschrift Fritz Schuls* (1951), pp. 315, 316.

to be effective an individual must have the capacity to sue. The author, who is Associate Professor of Law at the University of Tulsa in Oklahoma, seeks to show that the view that states alone are the subjects of international law, with the corollary that individuals are mere "objects," can no longer be sustained and that the individual has now emerged as a subject of international law. He supports his discussion of this rather sterile controversy with an account of recent developments in the Council of Europe, the European Economic Community and the United Nations. In spite of the many and varied deficiencies in their procedural arrangements for the protection of the individual, he suggests that there is sufficient evidence to show that the individual is what he calls a "procedural subject" of international law. The arguments are not always convincing. The author sometimes gives the impression of trying to establish his propositions by constant reiteration and by the use of unnecessary italics. His basic assumption that the protection of human rights depends on the capacity to sue may well be doubted. His conclusion that the individual is a procedural subject of international law is also open to question. Even under the European Convention of Human Rights where the protection of human rights has been taken furthest, the individual has no direct right of action but only the much more limited right of petition. His principal recommendation, that the International Court of Justice be open to individuals and to non-governmental groups, regional organisations "and even the United Nations," may seem rather unrealistic, yet this is perhaps one branch of international law where realism may be out of place, and where the idealism of writers such as Lauterpacht is beginning to show results.

FRANCIS JACOBS.

DIE RECHTE UND FREIHEITEN DER EUROPÄISCHEN MENSCHENRECHTSKONVENTION. By KARL JOSEF PARTSCH. [Berlin: Duncker & Humblot. 1966. 268 pp. DM.86.]

THIS is a most valuable addition to the rapidly growing literature on the European Convention for the Protection of Human Rights. The learned author, Professor for Public Law at the University of Bonn, has published a book which is not only of the highest academic standard and written in a style of remarkable clarity and cleanness, but also designed to satisfy the practitioner's requirements.

After an introductory chapter Professor Partsch considers the general position of the Convention in international as well as in municipal law. He notes without comment that the United Kingdom and the Scandinavian countries find it possible to adhere to the Convention without incorporating it into municipal law. Can we be certain that in fact English law complies with the terms of the Convention? Does English law, for instance, give full effect to Article 8 which, subject to certain exceptions, guarantees the right to respect for private life and correspondence? Is the guarantee of property rights, created by the Protocol of March 1952, satisfactorily implemented by the law of the United Kingdom, including legislation relating to taxation, leasehold enfranchisement and so forth?

The learned author's third chapter deals with the scope of the Convention and its interpretation, particularly its Article 14 proclaiming the important principle of non-discrimination. The reader will find a significant point made here which recently had to be tested in the practice of the Strasbourg authorities. As Professor Partsch explains, the Convention establishes a "collective guarantee" which includes willingness to tolerate "intervention" by anyone entitled to complain under the terms of the treaty. It follows that the defence based on the right to domestic jurisdiction can be allowed only the most limited ambit.

The principal chapter is the fourth which contains a detailed commentary

upon each provision of the Convention. It displays a complete command of both the literature published in the various member States and the practice of the Strasbourg authorities. It also takes due account of the judicial practice in those countries which have conferred the force of municipal law upon the Convention. The author has succeeded in clarifying the meaning and effect of each human right guaranteed by the Convention. Occasionally he provides his reader with references to doubtful cases which have not yet been tested. There is room for the impression, however, that in this respect Professor Partsch has remained unnecessarily reticent and that his comments would have gained by greater attention to past and present State practices and their reconcilability with the terms of the Convention. If "everyone has right to liberty and security of person" (Article 5), does this preclude the State from withholding or withdrawing passports or from imposing financial sacrifices in the event of emigration? If "in the determination of his civil rights and obligations . . . everyone is entitled to a fair . . . hearing" (Article 6), does the rich material on denial of justice yield any guidance on judicial acts which may be held to violate the required standard?

These are only some of the questions which in years to come may have to be considered in Strasbourg. In answering them Professor Partsch's detached objectivity and soundness of judgment have an important contribution to make.

F. A. MANN.

ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS. Herausgegeben von den Mitgliedern des Bundesverfassungsgerichts. [Tübingen: J. C. B. Mohr (Paul Siebeck). Vol. 16, 1964, x + 409 pp., Vol. 17, 1965, vi + 420 pp., Vol. 18, 1965, viii + 490 pp., Vol. 19, 1966, ix + 444 pp., Vol. 20, 1967, viii + 418 pp. Price: Vol. 16 DM.26; Vols. 17, 18, 19, 20, DM.29 each.]

THE Federal German Constitutional Court has since its beginnings been one of the pillars on which the new democracy in the Federal Republic rests. Signs of an approaching trial of strength with forces, who wish to reverse the entire development since 1945, are now beginning to appear. Exactly as after 1918 the routine work of courts and administrative agencies proceeds correctly. But—again as after 1918—cases with a political element show only too clearly a new and unwelcome direction of events. It is not necessary for the lawyer to go outside the law reports in order to learn which way things are moving. The results of all but a few of the German trials of war criminals recall similar trials during the Weimar period. In a recent decision the Federal Supreme Court has held that there is nothing objectionable in a former member of the SS sitting as President in a division of a Court of Appeal specialising in matters of indemnification to victims of Nazi persecution! Where such writings on the wall appear, the part of the Federal Constitutional Court becomes even more vital than in more settled circumstances.

Unfortunately the last five volumes of the court's decisions, and in particular the last one, will do little to strengthen the feeling of optimism with which outside observers can watch the scene. It is true that the court continues to repel energetically the numerous petty infringements of the basic rights guaranteed in the country's constitution and to exercise a beneficial influence over Parliaments, administrative agencies and—last but not least—the inferior courts. This, however, is routine work—important, but not decisive. It is in the great political and in some way sensational cases that one cannot help seeing the shadows of Weimar rising from their graves.

Perhaps the most important among the cases which the court had to deal with in the last few years was the problem of party finances. It is, no

doubt, a typically German problem and requires a few words of explanation to non-German readers. The rise of the Nazi party from 1925 to 1933 was greatly assisted by the large amounts which German industrialists placed at the disposal of the Nazi party and its nationalist allies. The three large democratic parties now represented in the Federal Parliament resolved to be independent of the power of the private purse. For years therefore very large sums of money appeared quite frankly in the Federal budget intended to support the work of these parties. These moneys formed a major source of their income. There was no clear relationship between the size of the sums coming from public funds in this way on the one hand and the size or importance, the actual expenses or the other sources of income of the respective parties on the other hand. A number of extreme right-wing parties, none of whom managed to obtain a seat in the Bonn Parliament—including the Neo-Nazi National Democratic Party—applied to the court for a declaration that this practice was in violation of the Basic Law. They received unexpected support in that the Social Democratic Party of Hesse filed an application to the same effect. No doubt, the motives of this application, coming as it did from representatives of a party benefiting from the moneys, was quite different. It was the kind of liberalistic purism, which in its idealistic lack of understanding of realities, had wrecked the Weimar Republic. In any case, one must sympathise with Professor Leibholz, a judge of the court, who in an address to the German Association of Teachers of Constitutional Law referred to the applicants as an "unholy alliance." The applicants, however, were in the main (though not entirely) successful. The court held that the Basic Law did not sanction the payments in question. It also held, however, that it was permissible that the disbursements incurred by the parties and caused by an actual election campaign, which had been conducted in an adequate manner, should be refunded from taxpayers' money (see Vol. 20, p. 56 *et seq.*). The judgment posed most difficult problems to all the democratic parties. In effect it pleased no one except the extremists. The failure of the court to take a clear line one way or the other was generally felt to be a sign of weakness. Whether the recent successes of the Neo-Nazis are *post hoc* or *propter hoc* is open to dispute.

The decision was accompanied by a painful interlude. All the different applicants moved for the exclusion of Judge Leibholz from the court for the purpose of these proceedings on the ground that his somewhat indiscreet remarks referred to above had revealed bias. The motion was successful. This decision of the court on its part was heavily criticised by eminent academic authorities who considered it as an infringement of the right of free speech, which on its part is guaranteed by the Basic Law. The discrepancy between the Constitutional Court's attitude to Judge Leibholz on the one hand and the Federal Supreme Court's approval of the former SS man is certainly startling.

One might perhaps think such scruples to be less well-founded but for the most unfortunate "*Spiegel*" case. In this case a totally unfounded allegation of treason was laid against the editor of this well-known German weekly and a number of the members of its staff. The investigation was opened by a gigantic search of the premises of the paper and by the seizure of its entire voluminous archives. Both included masses of material which could not conceivably be of the slightest relevance. It was admittedly conducted largely as a "fishing expedition." Its result was entirely negative. Proceedings were brought before the court for a declaration that the attachment of the editor and the other journalists as well as the orders for search and seizure were infringing a number of rules of the Basic Law as well as the principle of the rule of law itself. This application was unsuccessful. But it clearly had the support of a very substantial minority within the court. In German courts dissenting votes are not published. The public hears merely the voice of the majority. In this case, however, the minority was strong

enough to secure that at least its arguments should be presented. One part of the decision therefore sets out the views of those who held that the Basic Law had been infringed. This is followed by a statement of the reasons against this view. In neither case are we told the names of the judges supporting one or the other opinion. It is this aspect which tends to turn the open disagreement within the court into a conspicuous source of weakness. What is worse is that some of the arguments supporting the majority votum have a desperate similarity to the kind of considerations which the late and in this respect unlamented Reichsgericht used in some of its spectacular political decisions during the period which led to the disaster of 1933. What is, however, perhaps the most significant aspect of the matter is that those who were responsible for proceedings which nearly half the members of the Constitutional Court thought highly objectionable were themselves judges and state prosecutors at the Supreme Federal Court, *i.e.*, personalities working at the highest level of the Federal German administration of justice.

Judge Leibholz, writing in *Politics and Law* (1965) at page 881, has said that the constitutional courts derive their force not only from the law, but also from the "confidence in their activity shown by the people." Viewing the developments of the last few years one may well ask with some measure of anxiety whether the Federal Constitutional Court will preserve this confidence and—perhaps even more—what sort of people it will be whose confidence will matter.

E. J. COHN.

RUSH TO JUDGMENT. By MARK LANE. [London: The Bodley Head. 1966. 478 pp. (with index). 42s. net.]

WHENCE the title? Defending Hadfield on a charge of attempting to kill George III, Thomas Erskine spoke the memorable words:

> "An attack upon the king is considered to be parricide against the state, and the jury and the witnesses, and even the judges, are the children. It is fit, on that account, that there should be a solemn pause before we rush to judgment."

The President's Commission on the Kennedy assassination was established on November 29, 1963, seven days after the deed. There were eight members and their attendance at the fifty-one sessions over a period of seven months was less than perfect: one attended five sessions, another sixteen—although the chairman, Chief Justice Warren, "scarcely ever failed," as Professor Trevor-Roper notes in his introduction to Mr. Lane's book. When the Report was presented to the President on September 24, 1964, it attracted much praise: fairly characteristic was the assertion of a respected commentator, Mr. Harrison E. Salisbury, that no material question concerning President Kennedy's death now remained unanswered.

But there were dissenting voices. Mr. Lane is an American lawyer of great ability, and the mother of the reputed assassin engaged him to represent her son's interests before the Commission. The Commission, however, did not agree and it selected as protector of Oswald's interests Mr. Walter Craig, President of the American Bar Association. According to the official record, Mr. Craig attended only two sessions and spoke little. "A good defence attorney could take me apart," one witness told the Commission—but Mr. Craig was not present. Indeed, he denied that he was there as counsel for the alleged assassin. That seems right because the Report states that he had been requested "to participate in the investigation and to advise the Commission whether in his opinion the proceedings conformed to the basic principles of American justice."

A year before, the Supreme Court decided the great case of *Gideon* v.

Wainwright, 372 U.S. 335 and held that the Sixth Amendment to the Constitution guaranteed to an accused the right to be represented by counsel. Mr. Lane may be extravagant in his assertion that "the denial of counsel to the deceased was an act both unprecedented and unfair," but it does appear that had there been cross-examination of witnesses the evidence of some of whom was elicited by leading questions put by Commission counsel the testing of that evidence would have been more effective. Cross-examination might well have resulted in a more satisfactory finding as to the circumstances in which the rifle found on the sixth floor of the Book Depository Building was described initially as a 7·65 German Mauser—and so described by one of the finders, Deputy Constable Weitzman, who had some knowledge of firearms. Although Mr. Lane was permitted to examine the alleged assassination weapon when he testified before the Commission, Weitzman was not and was not asked the question whether the weapon produced was the weapon which he had found. The mistake, if such it was, is the odder because clearly stamped on the weapon produced before the Commission were the words "MADE ITALY," and "CAL. 6·5." The Dallas authorities told the press the same day that it was a 7·65 German Mauser and District Attorney Wade repeated this at a televised press conference. According to Mr. Lane, Weitzman was not allowed to examine the firearm when he testified before the Commission. The other finder was Deputy Sheriff Boone and he also described the weapon as a 7·65 Mauser: he was shown the weapon (a Mannlicher-Carcano rifle) in the Commission's possession but he was unable to identify it as that which he and Weitzman had found.

An important aspect of the matter was the opinion of those in or near the Book Depository as to the direction from which the shots came. The great majority of the statements taken from those witnesses do not contain their opinion, but many of them said that the shots came from what was variously described as a knoll, underpass or viaduct near railway tracks on the west of the building. Six witnesses standing on the steps of the building almost directly under the window from which Oswald allegedly fired said they believed the shots came from the west. Their testimony is not referred to in the Report (though it can be found in Volumes II, VI and XXII of the *Hvidence*).

Only one witness identified Oswald as the man who fired the rifle. This was Howard L. Brennan. He testified that the man was standing at the window. The Report says that "most probably" he was either sitting or kneeling. Brennan told the Commission that after the President had passed his position he heard a crack that he thought positively was a motor-cycle backfire. Then, he said, something—neither described nor defined, notes Mr. Lane—made him think a firecracker was being thrown from the building, and he "glanced up" at the sixth-floor window and saw a man. Parts of Brennan's account of what happened after the shots are contradicted by other evidence, including that of the Secret Service chief in Dallas, Forrest V. Sorrels. Brennan declined to make a positive identification of Oswald when he first saw him in the police lineup. More difficulty arises from the evidence of Arnold Rowland: he saw a man with a rifle on the south-west corner window of the sixth floor (and a middle-aged Negro "hanging out" of the south-east corner window shortly before the shooting), whereas the Commission places Oswald at the south-east corner window.

The Report concluded that the same bullet which killed the President also struck Governor Connally. The Governor and his wife flatly disagreed, and in a detailed examination of the celebrated pictures taken by the bystander Zapruder *Life International* (November 28, 1966, after the publication of Mr. Lane's book) considered that the Commission's conclusion was a matter of reasonable doubt.

And so, on the essentials—attribution of blame, especially—of the whole case as found by the Commission concludes Mr. Lane. The affair has been

one of contention and Mr. Lane has laboured with great diligence to formulate his criticisms of the Commission.

FLORENCE O'DONOGHUE.

THE LAW OF TESTATE AND INTESTATE SUCCESSION IN GHANA. By MR. JUSTICE N. A. OLLENNU. Law in Africa Series. Number 16. [London: Sweet & Maxwell; Lagos: African Universities Press. 1966. xxvii and 382 pp. (with index). Hard bound £4 4s. net. Paper bound £2 5s. net.]

A STRAIGHTFORWARD account, in authoritative terms, primarily directed at the student in a Ghanaian law training course, Mr. Justice Ollennu's account of the complicated pattern of conflicting tribal and religious systems of succession and family law operating in Ghana will delight the anthropologist and mystify the lawyer. Without venturing to criticise the author's statements, note should be taken of the fact that it is rare to find unanimity among the tribal elders on any matter of tribal customary law; it will be surprising indeed if this work goes long unchallenged.

Even to any outsider, the juxtaposition of the statement that the matrilineal family may provide for guardianship of the children of a deceased son (pp. 141–142) with that in the next chapter, that the paternal family has no relationship with the children under matrilineal custom (p. 144), will be seen as clear signs of some uncertainty. The impression is of some sort of action photograph, the lines blurred in sectors of rapid movement. We may wonder whether the systems are converging or diverging, but must see them as changing.

This pattern of patrilineal and matrilineal tribal laws, overlaid with Muslim and Christian imported religious laws, can be compared with other parts of Africa. It suggests interesting conflict situations. Who inherits from the child of matrilineal mother and patrilineal father, or of patrilineal mother and matrilineal father? Can a wife's or child's rights be displaced by a man's conversion to Islam? But this book treats Ghana largely as if the situation were unique, and even tends to play down the internal conflict of laws. The non-Ghanaian lawyer will find it opens up interesting fields for speculation, but does not chart any particular path to follow.

P. J. SCHOFIELD.

THE LAW OF EVIDENCE IN NIGERIA. By T. AKINOLA AGUDA. Law in Africa Series: Number 22. [London: Sweet & Maxwell; Lagos: African Universities Press. 1966. xxx and 320 and (appendix and index) 88 pp. Hard bound £4 10s. net. Paper bound £2 5s. net.]

ONE of the tribulations of the expatriate colonial magistrate was to see many days hard work overturned on a slip in the drafting of a charge, or the admission of evidence. The strange wording of a code purportedly embodying English law, interpreted by an uncatalogued mass of local cases, put him at a grave disadvantage against an experienced and astute local practitioner. He would have given a lot for the use of a work like this, on the local law, based on the local cases. It would also have saved much time and money. If anyone suspects your reviewer of persecution mania, let him glance at the list of cases in this book, and compare it with, for instance *McNeil and Rains* in the same series. The efforts of publishers and author in this difficult field should be appreciated by all concerned.

P. J. SCHOFIELD.

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GOVERNMENT CONTRACTS: A STUDY OF METHODS OF CONTRACTING

THE purpose of this article is the examination of the principal types of contract employed by agencies of the central Government in the procurement of goods or services. Although such contracts are in principle governed by the ordinary law of contract,[1] the scale of Government procurement has led to the emergence of special devices and techniques in contracting, of which the function is to safeguard the public interest while assuring adequate reward for the contractor. The identity between the interests of Government and the public interest invests the study of Government contracts with a special importance.

It is doubtless true that most contracts of Government departments are of a straightforward business sort, by which the department procures generally available goods or services at prevailing prices. But the Government also places many major contracts for the development or production of highly specialised equipment, and for equally specialised construction, repair, maintenance or other work, in which considerable expenditure of public money is involved. These Government contracts, by means of which many of the community's needs are satisfied, cannot be equated with ordinary commercial contracts, concluded between parties at arm's length and with an exclusive view to immediate or eventual profit for both parties. The contractors to the Government seek profit, but they are also carrying out a public function in supplying the requirements of the state.[2] It may be thought that the conditions

[1] Mitchell, *The Contracts of Public Authorities*, pp. 5–6, 22–23, 226 *et seq.* and *passim*. Nevertheless, there is a need for the development of legal principles especially applicable to Government contracts, which will be appropriate to the unique relationship existing between the Government and its major contractors.

[2] *Cf.* the observations of Mr. Houghton, member for Sowerby, in a debate in the House of Commons on December 11, 1968: "I can only conclude that what is needed in this situation is a reappraisal by private industry of its relations with the Government, who will become an ever bigger buyer as the years go by. We need a frank and meaningful acceptance by industry, suppliers and contractors that the public interest is at stake and that the public are footing the bill. They are engaged in a service and not a commercial enterprise in this respect" (H.C.Deb. Vol. 686, col. 426). *Cf.* too the thesis

of a competitive market should enable the Government, like any other purchaser, to get value for its money, but if there is "an area, too large to be comfortable, in which the market economy does not automatically look after the public interest," [3] Government contracts undoubtedly are located in that area. The relationship between the Government and its major contractors is, then, of a special kind, and is characterised by a mutual dependence which is not typical of ordinary commercial transactions. While the Government depends upon the willingness and capacity of private contractors to supply many of its needs, the prosperity of some industries is largely sustained by Government contracts.[4]

The Government's object in contracting is to procure its requirements as cheaply as possible, consistently with securing the desired quality of goods or service. The Government's interest in cheap procurement has to be reconciled with the contractor's interest in profit, and also with the need to keep in existence a sufficient number of firms with the willingness and capacity to do the Government's work. The delicate balance that must be struck between the provision of reasonable profits to contractors and the limitation of cost to the Government calls for the use of different forms of contract that are appropriate to different contracting situations. The difficulty of achieving this balance, and also the lack of appreciation that still exists in some quarters of the special nature and function of the Government contract, are illustrated in an extreme form by the Ferranti Bloodhound missile contracts.[5]

In 1956 the Ministry of Aviation placed contracts with Ferranti Ltd. for the production and supply of components and equipment, previously developed by Ferranti Ltd. at Government expense, for the Bloodhound Mark I missile system. No fixed price was agreed at this stage, but it was a term of the contracts that the prices to be agreed must be "fair and reasonable." [6] Work began at once, but prices were not agreed until October 1960, when production was far advanced and substantial deliveries had already been made. A previous overestimation of costs of production by the Ministry's

of Dupré and Gustafson in "Contracting for Defense: Private Firms and the Public Interest" (1962) 77 Pol.Sc.Q. 161, that in defence procurement in the United States "public and private functions have become interwined. Business is no longer merely a supplier but a participant in the management and administration of a public function" (p. 176).

[3] Catherwood, *The Christian in Industrial Society*, 2nd ed. (1966), p. 35.

[4] This is true, in different degrees, of the electronics, computer, aircraft and pharmaceutical industries.

[5] Much of the inquiry and discussion relating to Government contracts centres upon the procurement of weapons, but it is emphasised that the modes of contracting here examined have no necessary or exclusive application to investment in the arms race.

[6] A contract for the sale of goods at a "fair" or "reasonable" price is valid: *Cannan* v. *Fowler* (1858) 14 C.B. 181; *Morgan* v. *Milman* (1858) 3 De G.M. & G. 24 at p. 34; *Cumberland* v. *Bowes* (1854) 15 C.B. 348; *Wenning* v. *Robinson* [1964–65] N.S.W.R. 614. The Ferranti contract, which was one for the manufacture and sale of goods at a "fair and reasonable" price to be "fixed by agreement" between the parties, was within this principle.

technical costs officers resulted in agreement upon a price which, as it turned out, gave a profit to Ferranti Ltd. of £5,770,000, or 82 per cent. on actual costs.[7] At the time when the prices were agreed, Ferranti Ltd. were in possession of information about actual costs of production which showed that the earlier estimates had been too high. This information was not disclosed to the Ministry's negotiators by Ferranti Ltd.,[8] although they had agreed the previous estimates of costs with the Ministry, and although the price quoted by them and accepted by the Ministry was based upon the prior overestimates. The resulting excess profit was subsequently discovered by the staff of the Comptroller and Auditor General. There appeared to be no legal means of compelling Ferranti Ltd. to disgorge the excess,[9] but after negotiation the company agreed to repay £4,250,000. This still left the company with a profit of 21 per cent. on costs. It is clear that there was in this transaction not only a failure in the technical contracting procedures used by the Ministry, but a fundamental difference of view between the parties as to the principles that should govern the relationship between the Government and its suppliers.

The contracts between the Ministry of Aviation and Ferranti Ltd. were negotiated fixed-price contracts. The fixed-price contract is regarded as the "basic type of incentive contract"[10] in Government procurement, and is preferred in principle to the various forms of "costed" contracts. The fixed price encourages the contractor to reduce costs and so enlarge its profit. The Government obtains no share of any saving on costs, but on the other hand is not at risk of having to reimburse inflated costs, as it is in ordinary "cost plus" contracts, and may have an expectation that reduced costs will result in lower prices on future contracts.

Although "fixed," the price in contracts of this type is not necessarily "firm," and may be amended in the course of performance of the contract. A "variation" or "escalation" clause may provide for adjustment of the price to take account of increases

[7] The price agreed allowed for a profit of 7 per cent. on estimated costs: see First Report of the Inquiry into the Pricing of Ministry of Aviation Contracts, 1964, Cmnd. 2428 (hereafter First Lang Report), para. 31. On a series of fixed-price contracts with the Ministry of Aviation from 1959 to 1963, Bristol Siddeley Engines Ltd. reaped a profit (including some profit due to mistaken double charging) of 74 per cent. on costs. See Second Special Report of the Committee of Public Accounts, H.C. 571 of 1966–67, para. 14.

[8] There was no express provision in the contracts requiring Ferranti Ltd. to make this disclosure.

[9] The Government did in theory possess the sanction of refusal to award future contracts to Ferranti Ltd., but, for at least some of the instruments manufactured by this company, there was no alternative source of supply.

[10] Sir Richard Way, Permanent Secretary, Ministry of Aviation, giving evidence before the Committee of Public Accounts (hereafter P.A.C.), H.C. 31–I of 1964–65, Minutes of Evidence, para. 510.

or decreases in costs,[11] and provision may be made for the modification of the Government's specifications, and consequent adjustment of price.[12]

In fixed-price contracts the price is determined either by negotiation or by competitive tender. Competitive tendering is preferred in principle in Government contracting [13] as the best means of keeping prices down. In free competition the tendering firms are likely to be relatively modest in their expectation of profit, and to submit tenders based upon a strict limitation of costs. In practice the tendering is often not freely competitive, in that only certain approved firms are invited to submit tenders,[14] but at all events competition is preserved among the tendering firms.

Despite official preference for this system of contracting, it is often impracticable to put Government work out to competitive tender, and instead a fixed price is negotiated with a particular firm.[15] This is often because only one firm has the necessary expertise or resources, perhaps because the contract is for highly specialised equipment of a kind developed and supplied by the firm under previous Government contracts. Indeed, it is a feature of Government contracting that particular firms become wedded to the Government in a relationship of mutual dependence that leaves little room for an invading entrepreneur. The relationship commonly begins with a project study contract,[16] and the firm that has

[11] *Cf.* Standard Conditions of Government Contracts for Stores Purchases, Form CCC/Stores/1, 1962 ed. (hereafter Standard Conditions: Stores), Nos. 44–46.

[12] *Cf.* Standard conditions: Stores, No. 8; General Conditions of Government Contracts for Building and Civil Engineering Works, Form CCC/Wks/1, edition 9, 1959, Nos. 7 (1) (*a*) and 9.

[13] For a recent statement of the Treasury view, see Minutes of Evidence taken before the P.A.C., H.C. 31–1 of 1964–65, para. 160.

[14] It may be the policy of a Government Department to limit the number of firms with which it regularly contracts, *e.g.*, so as to ensure continuity of experience among the contracting firms. *Cf.* the recommendation of the Working Party of the Economic Development Committee for Civil Engineering in its First Report on Efficiency in Road Construction (H.M.S.O., 1966) at p. 6 that "both the Ministry [of Transport] and the contractors themselves should aim to concentrate the execution of major road construction contracts in the hands of fewer teams."

[15] In February 1965 the Permanent Secretary, Ministry of Aviation, said in evidence to the P.A.C. that about 90 per cent. of Ministry of Aviation contracts were placed on an other than competitive basis: H.C. 31–1 of 1964–65, Minutes of Evidence, para. 521. Navy Department contracts placed without competition were said to be of a value of about £230 million per annum: Third Report of the P.A.C., H.C. 31–1 of 1964–65, para. 97.

[16] There are considerable difficulties in the way of placing project study (or "design study") contracts by means of competitive tender. See Treasury Minute on paras. 46–57 of the Third Report of the P.A.C., Session 1960–61, H.C. 23–1 of 1961–62, and Third Report of the P.A.C., H.C. 23–1 of 1961–62, paras. 48–50. Often a project study contract has to be awarded to a firm which has previously manufactured other equipment of which that required is to be an adaptation or to which it is technically related. Thus even the project study contract may be merely another link in the chain of relationship between the Government and a particular firm. See Appendix 4, "Design Study Contracts," to the Minutes of Evidence taken before the P.A.C., H.C. 23–1 of 1961–62.

completed a project study is likely to have established, in acquired expertise and facilities, an irresistibly strong claim to the award of the contract for development of the article. A production contract is commonly placed with the development contractor before development is complete. In this sort of continuing relationship it is often impracticable for the Government to effect a divorce and entrust subsequent stages of the programme to a different firm. It may seem that the termination of each contract is a distinct break, at which either party is free to refuse to continue with the programme,[17] but this freedom is often severely limited by technical and financial factors.[18] There may also be a legal restraint upon the freedom at all events of the contractor to resile from the relationship, in the form of an option clause relating to the next contract in the programme.[19] A development contract may require the Government department to " have due regard to the reasonable needs " of the contractor in placing the contract for production.[20]

Recourse to competitive tender may be excluded by the urgency of the Government's needs, or by the existence of a proprietary interest in the articles required. There are especial difficulties in providing for competitive tender in contracting for the development of new equipment,[21] and generally where it is not possible to furnish precise specifications. The Government may eschew competitive tender because of a policy of maintaining an existing

[17] The Government may be free to discontinue the relationship even during the currency of a contract. *Cf.* Standard Conditions: Stores, No. 56 (1) (the " break " clause).

[18] *Cf.* Treasury Minute on paras. 46–57 of the Third Report of the P.A.C., Session 1960–61, H.C. 23–I of 1961–62: " Research, development and production are integral parts of a continuous process, to all stages of which the Ministry [of Aviation]'s research establishments contribute by virtue of their specialised knowledge and facilities." The Government may invest a considerable sum in development of equipment, and may seek to recover part of this expenditure by contracting for a levy payment on commercial sales of the equipment by the development contractor when it proceeds to production. The contractor under a development contract has a vested interest in turning its acquired knowledge and facilities into further profits by undertaking production of the developed article. See also the Second Report of the Inquiry into the Pricing of Ministry of Aviation Contracts, 1965, Cmnd. 2581 (hereafter Second Lang Report), para. 7.

[19] No doubt, as the terms of the next contract in the series may yet have to be negotiated, the option clause may be no more than a " contract to make a contract," but its validity may be ensured by a provision by which the Government department is given the right to specify what is required. The option may also stipulate a maximum price.

[20] This may be a mere " understanding " between the department and the contractor (*cf.* Second Lang Report, para. 7), but alternatively there may be an express contractual provision to this effect. (*Cf.* Minutes of Evidence taken before the P.A.C., H.C. 24–I of 1962–63, para. 2804.) Such a contractual term is not a *brutum fulmen*. A statutory provision requiring " due regard " to be had to persons' interests is held to confer a measure of protection on those interests: see *Re Sutton Coldfield Grammar School* (1881) 7 App.Cas. 91 at p. 94. A discretion conferred subject to such a requirement must not be exercised capriciously: *cf. Ross* v. *The Charity Commissioners* (1882) 7 App. Cas. 463 at pp. 468–469. See also *Re Alexander's Timber Co.* (1901) 70 L.J.Ch. 767.

[21] But see Treasury Minute on paras. 62–69 of the Third Report of the P.A.C., Session 1961–62, H.C. 24–I of 1962–63.

base of manufacturing expertise in an industry, or because of broader considerations of social or economic planning.[22]

In the result, the negotiated fixed-price contract is extensively used in Government contracting. Lacking the security afforded by competition, the Government seeks to protect its position in price negotiation by obtaining reliable estimates of the contractor's costs. Cost estimation may be facilitated by previous experience of the Government department in contracting for similar types of service or equipment, or by information acquired in post-costing previous contracts, but often such a basis of knowledge is lacking, and the department must rely upon the estimates of costs made by its technical costs officers. Reliable estimation depends to a great extent upon access to information in the exclusive possession of the contractor. The required information is sometimes freely given by the contractor, but, in general, industry has not hitherto been devoted to the principle of "equality of information" in price negotiation with the Government.[23] Yet without equality of information the Government is at a serious disadvantage in the negotiations, and the prospect of achieving a "fair and reasonable price" [24] as stipulated by the contract may be remote.[25] This is strikingly evidenced by the Bristol Siddeley contracts with the Ministry of Aviation between 1959 and 1968. The company's negotiators for these contracts knew that the Ministry's cost estimates had been rendered inaccurate by actual cost reductions achieved, yet "continued year after year to submit quotations and to agree prices which they knew to be so far in excess of costs as to yield enormously high profits." [26] The company's negotiators did not scruple to draw the attention of the Ministry to factors operating to increase costs, while preserving silence about other factors which had brought about a more than compensatory reduction in costs. This was an abuse of the fixed-price contract, the purpose of which is that the contractor should seek higher profit by economy and efficiency, and not that it should reap rewards from the lack of information or wrongly based calculations of the Government's costs officers.[27]

[22] *Cf.* Peck and Scherer, *The Weapons Acquisition Process: An Economic Analysis*, 1962, p. 375 *et seq.*

[23] See Second Lang Report, para. 24. Contractors have in the past resisted proposals to include an "equality of information" condition in contracts: Minutes of Evidence taken before the P.A.C., H.C. 98–1 of 1966–67, paras. 1072, 1076.

[24] *Cf.* Standard Conditions: Stores, No. 48 (1).

[25] It is acknowledged that "perfect" equality of information is not attainable. See Minutes of Evidence taken before the P.A.C., H.C. 31–1 of 1964–65, para. 518 *et seq.*

[26] See Second Special Report of the P.A.C., H.C., 571 of 1966–67, para. 17, and Report of the Committee of Inquiry into Certain Contracts made with Bristol Siddeley Engines Ltd., H C. 129 of 1967–68.

[27] *Cf.* the admonition by President Wilson in addressing a meeting of executives on July 12, 1917: "Let us do sound business, but not in the midst of a mist." Cited in *United States* v. *Bethlehem Steel Corporation*, 315 U.S. 289 at p. 336 (1941).

Power to compel the disclosure by the contractor of relevant information may rest upon statute or derive from the contract itself. Section 10 of the Ministry of Supply Act 1939 empowers the Minister [28] to require a contractor to produce " any books or documents of any description specified in the directions," and to direct that records as specified by the Minister shall be kept by a contractor. Thus the production of records of costs incurred under previous contracts, or under an existing contract partially performed, may be demanded by the Minister. It appears, however, that there is an extreme reluctance to use the power conferred by section 10 to compel production. At no time after the Second World War did the Minister of Aviation use this power.[29]

The right to information may be secured by a term of the contract. Paragraph (8) of standard condition 48 [30] provides that for the purpose of fixing prices the contractor shall, if required, *inter alia*,

> " (*a*) afford facilities to the representative of the Authority to visit the Contractor's factory or workshop in order to examine the processes of manufacture and estimate or ascertain the costs of production of the Articles,
>
> (*b*) furnish such particulars of the said costs as may be required by the Authority and permit the same to be verified by the representative of the Authority by inspection of his books, accounts and other documents and records. . . ."

It appears that the Ministry of Aviation in the past construed the words " estimate or ascertain " in paragraph (8) (*a*) as " giving them a right to do one thing or the other but not both," [31] and thus as entitling them to obtain information necessary to make *estimates* of costs, but not at the same time to *ascertain* actual costs of production already incurred on a contract. This startling construction would appear to rest on the assumption that provision for *estimation* of costs contemplates fixed-price contracts, while provision for *ascertainment* of costs contemplates cost plus contracts. But nothing in condition 48 requires the words " estimate or ascertain " to be qualified in this way. The conjunction " or " is doubtless in its primary sense disjunctive, but the courts have interpreted this word with a great deal of freedom,[32] and its use does not necessarily imply the mutual exclusiveness of the words co-ordinated. Although informed by the Ministry of Aviation that it no longer inclined to the limited interpretation of condition 48 (8), the Lang Committee recommended that, in view of the

[28] *i.e.*, the Minister of Technology: see S.I. 1967 No. 155. (Formerly the Minister of Aviation: see S.I. 1959 No. 1768.)

[29] See Minutes of Evidence taken before the P.A.C., H.C. 22–I of 1963–64, para. 835 *et seq.*; Second Lang Report, para. 26.

[30] Of Standard Conditions: Stores.

[31] Second Lang Report, para. 23.

[32] See, *e.g.*, *Wright* v. *Kemp* (1789) 3 T.R. 470 at p. 473; *White* v. *Supple* (1842) 2 Dr. & War. 471 at pp. 474, 475; *Created* v. *Created* (1859) 28 L.J.Ch. 756 at p. 758; *Metropolitan Board of Works* v. *Steed* (1881) 8 Q.B.D. 445.

doubt that had attended the interpretation of the condition, a new condition should be drafted which would express clearly the right to equality of information.[33] The Ministry of Aviation had no success in persuading contractors to agree to a new condition to this effect, and it has been suggested by the Permanent Secretary that legislation is desirable, not for compulsion, but " as an indication of the view of Parliament of what is correct in the relationship between the Government and its contractors." [34] This recourse appears no longer to be necessary, for, after prolonged discussion, agreement in principle has been reached between the Government and industry upon the use of a new contractual condition securing the right of the Government to equality of information.[35]

The estimation of costs may be carried out independently by the department's technical costs officers and by the contractor,[36] but in the course of the investigation it may happen that an agreement or understanding is reached between the officers of the two parties as to the amount of the estimates. It is clear that such an agreement on estimates is not intended to be binding.[37] Neither party promises, even impliedly, that the estimates will prove correct, or that it will not modify its own estimate for the purpose of subsequent price negotiation. But this is not to say that an agreement on estimates is necessarily without any legal effect. If a contract has been concluded for the supply of goods at " fair and reasonable prices . . . to be fixed by agreement " between the parties,[38] and a price is subsequently agreed, that becomes the fixed contract price, and prima facie it is unalterable except by further agreement.[39] In negotiating the price, however, the parties are not absolutely free, for each is bound by the contract to attempt to reach agreement upon a " fair and reasonable " price. If it is clear that in reaching agreement upon a reasonable price the parties have placed reliance upon an agreed estimate of costs, and if it later appears that the agreed estimate was *substantially* incorrect, and that in consequence the agreed price was not " fair and reasonable," it is suggested that a court might find [40] that the agreement on the price was subject to an implied condition subsequent to the effect that if the estimates on which it was based should be shown by the actual out-turn of costs to have been substantially false, it should lapse, and the parties be obliged to renegotiate a fair and reasonable price.

[33] Second Lang Report, para. 26.
[34] Minutes of Evidence taken before the P.A.C., H.C. 98–1 of 1966–67, para. 1078.
[35] See the statement of Mr. Diamond, Chief Secretary to the Treasury, in the House of Commons on February 28, 1968: H.C.Deb. Vol. 759, col. 947 *et seq.*
[36] *Cf.* Second Lang Report, para. 89; Minutes of Evidence taken before the P.A.C., H.C. 81–1 of 1964–65, para. 542 *et seq.*
[37] *Cf.* First Lang Report, para. 12, footnote.
[38] Standard Conditions: Stores, No. 43 (1).
[39] And then subject to the technical requirements of consideration.
[40] Not " would necessarily find. . . ." The usual requirements for the implication of a term must be satisfied.

After the estimates of costs have been made, and the contractor has submitted its quotation, agreement is reached upon the fixed contract price. It has been the policy of the Government to negotiate prices that allow for a basic profit of 7½ per cent. on capital employed.[41] The basic rate of profit is adjusted by the application of the ratio of the firm's total costs of production over a certain period to its total capital employed, so as to arrive at a basic rate of profit on cost, and there may be allowances of additional profit on costs for "risk" and for "efficiency."[42] In the result, fixed-price contracts at present allow for a notional range of profit up to a normal maximum of 15 per cent. on capital employed. The profit formula is at present being reviewed by the Government, in consultation with industry.

In much Government contracting, especially for the development or production of new types of equipment, there is an element of hazard in the contract which far exceeds ordinary commercial risk. This hazard affects both parties, but there is an imbalance in favour of the contractor, which necessarily has a superior knowledge of cost determinants. Moreover, the contractor is likely to be unwilling to agree to a price that is not high enough to secure it against the possibility of loss from unforeseen contingencies, and in the result it is the Government that is put at risk of providing the contractor with greatly excessive profits out of public funds. In these circumstances, if refuge is not taken in the cost plus contract, a modified form of fixed-price contract may be appropriate. If the information available to the parties at the beginning of a contract is sufficient to enable estimates to be made as a basis for negotiation of an initial price, but reliance cannot be placed upon the soundness of the estimates, recourse may be had to a redeterminable fixed-price contract. In this form of contract, which has been found useful in Government procurement in the United States,[43] an initial price is agreed on the basis of available cost information, but the contract provides for renegotiation[44] of the price in the course of performance. It is stipulated that when performance has continued for a fixed period, or when a certain percentage of production has been completed, the parties shall

[41] A standard rate of profit of 10 per cent. on capital employed was adopted in 1935, and was reduced to 7½ per cent. in the course of the Second World War. See Epitome of the Reports from the P.A.C. 1938 to 1950, H.C. 155 of 1951–52, p. 91.

[42] The method of calculation in Ministry of Aviation contracts is explained in para. 58 of the Second Lang Report.

[43] There is a general description of the redeterminable fixed-price contract in *Procurement Study: Hearings before the Procurement Sub-committee of the Senate Armed Services Committee*, 86th Cong., 2d Session (1960) (hereafter Procurement Study), pp. 82–84. See also (1948) 10 Law & Contemp.Prob. 219–220, 231–234, 248–249 and Scherer, *The Weapons Acquisition Process: Economic Incentives* (1964), p. 187 *et seq.*

[44] An alternative clause provides for *downward redetermination* of the price according to a fixed formula if costs on preliminary production runs are lower than the original estimates of cost.

negotiate a revision of the price on the basis of the cost experience obtained, a ceiling being fixed to upward adjustment of the price. In the ordinary case there is a single renegotiation of the whole contract price,[45] which thereafter remains firm for the duration of the contract and may be either higher or lower than the initial, superseded contract price. The renegotiation is timed for the earliest date when sufficient cost information for the making of reliable estimates is expected to be available. Clearly, the successful operation of this type of contract is dependent upon a full disclosure by the contractor of particulars of incurred and estimated costs. In return it receives protection against loss resulting from unexpected or inflated costs, and it is intended that efficiency and economy of the contractor in the preliminary production period should be rewarded in fixing the final allowance for profit. A more flexible variant of this system is a provision for periodic renegotiation of the price in the light of continuously improving cost experience, each revision to apply to the succeeding period only.

An alternative means of reducing the hazard of contracts in which the ultimate costs are not predictable with confidence is provided by the target cost contract.[46] This is one of the post-costed types of contract, but it is designed to provide an element of incentive that is lacking in the cost plus contract. Although post-costed, the target cost contract requires the making of an initial estimate of costs to be incurred, and is not an appropriate method of contracting unless there is a sufficient basis for a reasonably realistic initial estimate to be made. This estimate is negotiated between the parties, and when agreed it constitutes the target, or amount to which it is considered practicable for the contractor to reduce its costs. The parties next agree upon the amount of profit to be added to the target cost, and a provisional or target price is thus arrived at. If the contractor succeeds in reducing its costs below the target cost figure, the cost saving is shared between the Government and the contractor, and as the contractor's profit may in this way be increased above the target profit, an incentive to efficiency is provided. If, on the other hand, costs rise above the target cost, the excess is similarly shared between the Government and the contractor, and in this way each party enjoys a measure of protection against the consequences of inflation of costs. The ratio in which savings or excess costs are shared is variable. The Government may seek to sharpen incentive by allowing the contractor's percentage share of the savings to increase in proportion to the increase in savings achieved.[47] On

[45] Alternatively the price revision may be exclusively prospective, and the initial price continue to apply, *pro rata*, to the preliminary "trial run" of performance.

[46] It is also termed the "fixed price incentive" contract. A variant of this is the "cost plus incentive" contract: see Procurement Study, p. 89.

[47] *Cf.* the proposals in para. 31 of the Second Lang Report.

the other hand, the Government's liability in respect of costs above the target may be limited by the fixing of a maximum eventual price, or by similar devices,[48] and a ceiling may be fixed to additional profit earned by savings on cost.

It is essential to the effectiveness of the target cost contract that the target should be agreed early in the contract, and that it should be possible to establish a target which bears a reasonably accurate relation to actual costs.[49] This type of contract is especially suitable where performance is to continue for a long period, and the parties lack sufficient cost experience for reliable prediction of the eventual out-turn of costs, or are unable to agree on a firm contract price.[50] The target cost contract permits of great flexibility in the arrangement of terms to suit the circumstances of the particular transaction to which it is applied.[51] It does, however, present a certain risk for the Government in that the contractor has an incentive to inflate cost estimates and establish a high target. Moreover, it is a disadvantage of this type of contract that much effort has to be applied to the costing process. Not only is a careful assessment of likely cost required at the beginning of the contract, but in addition post-costing is necessary after the completion of performance in order to determine the final price.[52]

The kinds of contract so far considered all embody an element of incentive to reduce costs. In the cost plus contract, costs incurred by the contractor are ascertained after performance of the contract and are reimbursed by the Government, and an agreed sum is paid to the contractor as profit. There is no profit incentive to reduce costs in this type of contract, and it is in general not regarded with favour in Government contracting.[53] In addition,

[48] See, *e.g.*, Second Lang Report, para. 33 (iii). There is some reluctance among contractors to agree to a maximum price with the attendant risk of having to absorb the whole of costs in excess of the maximum. See Minutes of Evidence taken before the P.A.C., H.C. 31–1 of 1964–65, para. 533.

[49] *Cf.* Second Lang Report, para. 33 (i). If too high it may be beaten without stimulating the firm to efficient performance and may result in excess profit. If too low it may fail altogether to provide an incentive to economy. Accurate fixing of targets is not to be expected without equality of information between the parties.

[50] *Cf.* Second Lang Report, paras. 30, 32; Minutes of Evidence taken before the P.A.C., H.C. 31–1 of 1964–65, para. 534.

[51] *Cf.* Lloyd, "Pricing in War Contracts" (1943) 10 Law & Contemp.Prob. 284 at pp. 251–252; Moore, "Efficiency and Public Policy in Defense Procurement" (1964) 29 Law & Contemp.Prob. 3 at pp. 15–17. "Performance" (*e.g.*, delivery date) as well as "cost" targets may be set, with a bonus for surpassing them. On these "multidimensional contractual incentives" see Scherer, *op. cit.*, note 48, *supra*, pp. 136–137, 166 *et seq.*

[52] *Cf.* Second Lang Report, para. 34.

[53] See, *e.g.*, Fourth Report of the Select Committee on National Expenditure, H.C. 38 of 1940–41, para. 28; Minutes of Evidence taken before Sub-Committee E of the Select Committee on Estimates, H.C. 34 of 1956–57, para. 1124; the remarks of the Minister of Aviation in a debate in the House of Commons on April 29, 1964, H.C.Deb., Vol. 694, col. 409. The American view is the same: see the statement of Secretary of Defense McNamara, in *Hearings before the Subcommittee on Defense Procurement of the Joint Economic Committee, Congress of the United States*, 88th Cong., 2d Session (1964), p. 12.

the cost plus contract requires close financial supervision by the Government which it may be difficult to provide, and the right to reimbursement of costs is open to abuse by contractors.[54] In spite of these defects, considerable use is made of the cost plus contract in Government contracting for research and development, and generally where costs are unpredictable.[55] In this situation the cost plus contract confers a degree of security upon each party. It may be less costly for the Government than a negotiated fixed-price contract, in which the contractor is disposed to negotiate a price high enough to secure its profit against all unforeseen contingencies. The contractor, on the other hand, is freed from risk by the use of the cost plus contract. Indeed, where modifications of design, whether dictated by changes in the Government's requirements or by experience gained in the course of development, are likely to be extensive, and where no reliable estimate of costs can be made, there is no basis for the negotiation of either a fixed-price or a target cost contract, and only the cost plus contract provides the flexibility that is needed.

The cost plus contract is sufficiently unlike the incentive types of contract to have been characterised as establishing an administrative relationship, in which the contractor receives " a payment in lieu of profits forgone." [56] Yet the distinction between this and the other types of contract is not as profound as may appear. Even in the negotiated fixed-price contract, the agreed profit is ordinarily determined by the addition to estimated costs of a sum calculated according to a fixed rate,[57] and the more accurate the estimate, the closer the approximation of the negotiated profit to a fixed fee.

The remuneration of the contractor in the cost plus contract may consist either in a fixed fee or in a percentage of costs incurred. The cost plus percentage contract has been often condemned,[58] for the reason that the contractor, who gains financially from increases in costs, has a disincentive to economical performance. In the cost plus fixed-profit contract this disincentive

[54] *Cf.* Second Report of the P.A.C., H.C. 51–1 of 1959–60, para. 45, and Mr. Harold Wilson in a debate in the House of Commons on December 19, 1960, H.C.Deb., Vol. 632, col. 906. There are temptations for the contractor to load overheads onto the cost plus contract, to neglect economies in the performance of the contract, and to prolong the life of the contract if other work is not readily available.

[55] The contract with the British Aircraft Corporation Ltd. for the design and development of the airframe of the Concorde aircraft was settled on a cost plus basis: see Third Report of the P.A.C., H.C. 81–1 of 1964–65, para. 23.

[56] Tybout, *Government Contracting in Atomic Energy* (1956), p. 175, cited by Peck and Scherer, *op cit.*, note 23, *supra*, p. 61.

[57] See note 41, *supra*.

[58] Ashworth, *Contracts and Finance: History of the Second World War, United Kingdom Civil Series*, 1953, p. 67, writes of the cost plus contract as used in the war: " Its effect was to make a department completely dependent on the assiduity and integrity of its contractor, while at the same time frequently tempting the latter to be wasteful at its expense, as the commonest arrangement was for his profit to rise in direct proportion to his costs." The use of the cost plus percentage contract is prohibited in United States Government procurement: 10 U.S.C., s. 2306 (*a*); 41 U.S.C., s. 254 (*b*) (1964).

is removed, but it would appear to be a feature of cost plus contracts in general that actual costs outrun the estimates.[59] Assured of cost reimbursement, the contractor may be tempted to over-expenditure in avoidance of risk, and to expensive refinements of the product.

A contractual device by which the Government may limit its liability under a cost plus contract is the maximum price clause. Here the Government undertakes to reimburse costs and pay the agreed percentage or fixed profit subject to a total payment of a maximum fixed amount. The maximum price contract puts the contractor at risk of loss and is not regarded with favour by industry.[60] Agreement on a maximum price requires an initial estimate to be made of the total cost. If this estimate can be made with some degree of confidence. it is likely that a target cost or fixed-price contract will be preferred.

The extent of the Government's liability to the contractor in the cost plus contract is determined by post-costing the contract. Through post-costing, the Government is also enabled to exercise control of expenditure which is to be reimbursed out of public funds, and in particular to ensure that overhead expenses are not improperly attributed to the Government contract.[61]

The choice of the most appropriate contract-type and the skilful management of the progress of the contract may do much to reduce the risk of prejudice to the Government in procurement, but none of the available forms of contract can confer complete security against loss resulting from extravagant costs or excessive profits.[62] At present, no regular machinery exists for the detection or recovery of excess profits obtained under a completed contract. In general the Government has no knowledge of the amount of

[59] *Cf.* Third Report of the P.A.C., H.C. 23–1 of 1961–62, para. 61. Scherer, *op. cit.*, note 48, *supra*, p. 26, concludes that "in their zeal to win new development program assignments, firms tend to submit excessively optimistic predictions of the proposed program's quality, time and cost outcomes." And see *ibid.* p. 29 *et seq.* *Cf.* the observation of Mr. Basil de Ferranti, member for Morecambe and Lonsdale, in the House of Commons on December 19, 1960, that in contracting for the development of complex weapons systems "One is venturing into wholly unknown territory, and the only thing one can state with any certainty is that whatever estimate is produced it will be wrong . . . the nation is, in effect, signing a blank cheque": H.C.Deb., Vol. 632, col. 930.

[60] See Second Lang Report, para. 15. In a form of this contract used in the United States the contractor is relieved of liability for further performance when costs reach the maximum. See Procurement Study, p. 88.

[61] In defence procurement in the United States the allowance of costs to be reimbursed is governed by a comprehensive body of principles. In general a cost is held to be unreasonable and is disallowed "if it exceeds that which would be incurred by an ordinarily prudent firm in the conduct of a competitive business" (Procurement Study, p. 87). *Cf.* Standard Conditions: Stores, No. 54 (3) and (4).

[62] *Cf.* the statement of the Chairman of the United States Renegotiation Board in Procurement Study at p. 119.

profit actually secured by firms in incentive contracts,[43] and if it is accidentally discovered that excessive profits have been made, their recapture depends upon the degree of pressure the Government is able to bring to bear upon the particular contractor, and no settled principles govern the measure and conditions of repayment.[44] There is, it is suggested, a strong case for replacing the present arbitrary and uncertain practice by a system of post-costing and renegotiation of Government contracts. The present Government has announced its intention of securing the right to post-cost contracts, and discussions with industry are taking place on the terms of a new standard contract condition which will provide for equality of information, including post-costing. In a statement on this subject in the House of Commons on March 2, 1966, the Minister of Aviation said [45]:

> "It is not of course necessary, nor is it the Government's intention, that post-costing should be used to renegotiate prices for contracts already placed. But post-costing does mean that profits grossly in excess of those allowed for when prices are negotiated—as in the Ferranti case—will be brought to light; and, in such cases, the Government will not be precluded from seeking some reimbursement outside the terms of the contract."

There can be no doubt that post-costing would provide information useful to the Government both in placing future contracts, especially further contracts in the same series, and in discovering excessive profits and bringing pressure to bear on the contractor for repayment. Yet if repayment of excess profits discovered by post-costing is to be sought, as doubtless it would be,[46] it seems better to acknowledge this and to provide a regular and rational procedure for obtaining the repayment. The Lang Committee expressed its opposition to the extension of post-costing, which it assumed would be coupled with provision for renegotiation of prices, to fixed-price contracts, principally on the ground that "the incentive principle inherent in the fixed-price contract, a principle of advantage to both parties, would be severely jeopardised." [47] This, however, is open to question, for the object of renegotiation would not be the disallowance of reasonable additional profits

[43] See Second Report of the Select Committee on Estimates, H.C. 34 of 1956–57, para. 125; Minutes of Evidence taken before the P.A.C., H.C. 22–I of 1963–64, paras. 763, 821.

[44] *Cf.* the attempt to establish such principles in the Second Special Report of the P.A.C., H.C. 571 of 1966–67, paras. 43–46.

[45] H.C.Deb. Vol. 725, col. 1302. *Cf.* the statement of Mr. Diamond, Chief Secretary to the Treasury, in the House of Commons on February 26, 1968, from which it appears that agreement in principle has been reached with industry on the use of a new contractual condition which will secure the right of the Government to post-cost individual contracts. The statement confirms that fixed prices freely negotiated will "in general not be retrospectively modified": H.C.Deb. Vol. 759, col. 948.

[46] *Cf.* Second Lang Report, para. 69.

[47] Second Lang Report, para. 69. *Cf.* Second Report of the P.A.C., H.C. 96–I of 1966–67, para. 48 *et seq.*

earned by a firm through efficient performance of its contract. It is an established principle of Government fixed-price contracting that it is proper for a firm by achieving economies to increase its profit above the agreed margin on costs, and renegotiation would be directed not against this principle but against the retention of *excessive* profits which have accrued as a result of misjudgments in prediction of future costs. There is no principle that requires that such windfalls should be left with the contractor into whose hands they have gratuitously fallen, and it is hard to contest the view of the Lang Committee that there is " a moral responsibility on the contractor not to exploit the nation unfairly in defence contracts " [68]—or, it may be added, in contracts for the procurement of the pacific requirements of the nation.

It would appear that industry has, albeit with reluctance, conceded the necessity for provision for redetermination of prices, for agreement has recently been reached between industry and Government on the creation of an impartial Review Board to which individual contracts may be referred by either Government or contractor, to establish whether reimbursement of excess profit, or compensation for loss, is justified. It is proposed that contracts may be referred to the Board if a profit of 27½ per cent. or more on capital employed has been gained, or a loss of 15 per cent. or more incurred. In exceptional circumstances there may be review of gains or losses below these percentages, where there is evidence that prices were not fair and reasonable. Acceptance of the rulings of the Review Board will be secured by a new contractual condition. It is also proposed that the Review Board should from time to time review the rate of profit on Government contracts, and advise the Government on any change required to ensure that earnings on these contracts are related to changing trends in overall average earnings of industry.[69]

These recent developments invite consideration of the practice in the United States, where post-costing is in regular use as a means to the discovery and recapture of excessive profits. The Renegotiation Act of 1942 [70] established machinery to compel the repayment by contractors of excessive profits made under defence contracts. The constitutionality of the Renegotiation Act was unsuccessfully challenged in the Supreme Court,[71] and the principle of profit renegotiation, at first regarded as a temporary emergency device, was retained in subsequent enactments, and is now an established part of the defence procurement process.[72] A Renegotiation Board

[68] Second Lang Report, para. 72.
[69] See the statement of Mr. Diamond, Chief Secretary to the Treasury, in the House of Commons on February 26, 1968: H.C.Deb. Vol. 759, col. 947 *et seq.*
[70] This original " Renegotiation Act " actually consisted in certain provisions in s. 403 of the Sixth Supplemental National Defense Appropriations Act, approved on April 28, 1942, 56 Stat. 245, 50 U.S.C.A., s. 1191 (1964).
[71] *Lichter* v. *United States*, 334 U.S. 742 (1948).
[72] The present statute is the Renegotiation Act of 1951, 65 Stat. 7, 50 U.S.C.A., s. 1211–1233 (1964).

constituted under the Act makes determinations of the overall profits obtained on defence contracts in the course of a fiscal year by those defence contractors that have not been expressly exempted from its inquiries, and has power to compel the repayment of excess profits. In determining whether a contractor's profits have been excessive, the Board is required to take into consideration the efficiency of the firm, the reasonableness of costs and profits, the amount and source of public and private capital employed, the extent of risk assumed, the nature and extent of the firm's contribution to the defence effort, and the character of the firm's business.[73]

Individual defence contracts are not examined by the Renegotiation Board in its determination of overall profits, but invariably include a condition authorising the auditing of the contract by the General Accounting Office,[74] The GAO reports on excessive profits and may recommend to the contracting authority that a repayment be negotiated with the contractor.[75]

It is suggested that the system of post-costing and upward or downward redetermination of prices which has been agreed in principle between the British Government and industry is consistent with the retention of incentive in procurement contracts, and that it could bring about a more effective and mutually beneficial partnership between Government and the sectors of industry that supply its major needs.

C. C. Turpin.*

[73] These factors are analysed by Marcus, "The Need for Standards in Renegotiation and Other Determinations of Defense Profits" (1963) 32 Geo.Wash.L.Rev. 28. For a critical discussion of the administration of profit renegotiation in the United States, see Scherer, *op. cit.*, note 43, *supra*, pp. 252 *et seq.*, 337 *et seq.*

[74] See 10 U.S.C., s. 2313 (*b*) (1964).

[75] See House Committee on Government Operations, *Defense Contract Audits*, H.R.Rep. No. 1726, 89th Cong. 2d Sess. (1966). The contracting agency is not always successful in securing a refund from the contractor. *Cf. Hearings before the Subcommittee on Defense Procurement*, pp. 98–99, cited note 58, *supra*.

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RECOGNITION OF FOREIGN DIVORCE DECREES

It is only about three years since the Court of Appeal defined the grounds on which an English court could assume jurisdiction in matrimonial proceedings in restrictive terms [1] but now the House of Lords in *Indyka* v. *Indyka* [2] has provided a far more expansionist approach to the question of recognition of foreign decrees or orders, though the decision may only be authority for the rules as to recognition of foreign decrees of divorce and not for the recognition rules in other matrimonial causes.[3]

So many well-established principles and rules have been shaken or had doubts cast upon them by this decision that it is proposed to examine, first, the facts and specific problem raised by *Indyka* and then to examine the effects of the five differing judgments of the House of Lords on the law as to recognition of foreign decrees and orders of divorce and of other matrimonial relief.

I. Indyka *v.* Indyka: the Facts and Immediate Problem at Issue

If one assumes that, following *Travers* v. *Holley*,[4] an English court will recognise a divorce decree of a foreign court granted in factual circumstances where, *mutatis mutandis*, an English court would have had jurisdiction, then it has generally been assumed that the material time at which the similarity between their foreign jurisdictional facts and the English rule as to jurisdiction must exist is the time when the foreign divorce proceedings are instituted. It has been suggested [5] that a foreign divorce obtained when, for example, section 40 (1) of the Matrimonial Causes Act 1965 was not part of English domestic law would not be recognised, though the foreign court had exercised jurisdiction in similar circumstances to those provided for by that section. Such was the issue raised, apparently, in *Indyka*.

Here H married W1 in Czechoslovakia in 1938, both being Czech citizens. H left Czechoslovakia at the beginning of the war and, after war service in the Polish Army, eventually came to England in 1946, where he acquired a domicile of choice. It was

[1] *Garthwaite* v. *Garthwaite* [1964] P. 356, especially *per* Diplock L.J. at pp. 390–391; and see *Ross Smith* v. *Ross Smith* [1963] A.C. 280, though see now *Padolecchia* v. *Padolecchia* [1968] 2 W.L.R. 178.

[2] [1967] 3 W.L.R. 510; [1967] 2 All E.R. 689; see Latey (1967) 16 I.C.L.Q. 982; Webb (1967) 16 I.C.L.Q. 997; Lipstein [1967] C.L.J. 182; Mann (1968) 84 L.Q.R. 18.

[3] See Part V, *infra*.

[4] [1953] P. 246.

[5] Dicey, *Conflict of Laws*, 7th ed. (1958), p. 322; though see Dicey and Morris, *Conflict of Laws*, 8th ed. (1967), p. 314 and First Supplement.

decided that as W1 refused to live with H she had deserted him. In January 1949 W1 obtained a divorce in Czechoslovakia on the ground of "deep disruption of marital relations," and though the Czech court, acting on different evidence, took the view that H had deserted W1, there was no doubt that the decree was good by Czech law.[6] In 1959, H went through a ceremony of marriage in England with W2, who petitioned for divorce in the present English proceedings on the grounds of H's cruelty. H alleged that his marriage to W2 was void for bigamy in that the Czech decree dissolving his marriage to W1 should not be recognised in England, and so H cross-petitioned for a decree of nullity.

The basic issue raised by the case is as to whether the English court would recognise the Czech decree. There was no doubt that the Czech court had jurisdiction in the Czech sense, but it was not wholly clear from the judgments whether the Czech court had exercised jurisdiction on the basis of nationality [7] or on the ground that the petitioner was resident in Czechoslovakia.[8] On what jurisdictional basis, known to English domestic law, could the Czech court have acted in granting W1 a decree of divorce? It could clearly not have been domicile, in the English sense, because H and, therefore, W1 were domiciled in England in 1949. As W1 was considered to have deserted H there was no jurisdictional ground similar to that under section 40 (1) (*a*) of the Matrimonial Causes Act.[9] W1 had, however, been resident in Czechoslovakia for at least three years preceding her petition and therefore appeared to fall within the English jurisdictional rule provided, now, by the Matrimonial Causes Act 1965, s. 40 (1) (*b*), and, at first sight, on the application of *Travers* v. *Holley*, the Czech decree deserved recognition. The problem with this jurisdictional basis was that W1's decree was granted and effective by February 1949, whereas English jurisdiction based on a wife's three years' residence was not introduced until December 1949, by the Law Reform (Miscellaneous Provisions) Act 1949, s. 1. Should an English court recognise a foreign decree granted in circumstances which, at the time of the later English proceedings, gave rise to jurisdiction under English law but which did not do so at the date of the foreign decree?

[6] [1967] 3 W.L.R. 510 at p. 529, *per* Lord Morris; but see Lipstein [1967] C.L.J. 42, 43.

[7] *Ibid.* at p. 529, *per* Lord Morris, p. 546, *per* Lord Pearce, and p. 547, *per* Lord Wilberforce.

[8] *Ibid.* at p. 562, *per* Lord Pearson; but see Lord Reid at p. 515, who had doubts as to the basis of Czech jurisdiction.

[9] Originally introduced by s. 18 of the Matrimonial Causes Act 1937. It has been argued (Lipstein [1967] C.L.J 42, 43) that if the English court had examined the facts on which the Czech court assumed jurisdiction, then H. deserted W1, rather than vice versa, and so the foreign decree might have been recognised on the basis of similarity to s. 40 (1) (*a*), on the assumption that H. deserted W1 before he lost his Czech domicile of origin. See also counsel for the second wife, *arguendo*: [1967] P. 233 at p. 246, in the Court of Appeal.

This was the problem raised by the case and the approach to it in the lower courts [10] was, not surprisingly, to assume the validity of the *Travers* v. *Holley* principle and to examine the narrow issue of whether English recognition rules, which kept in step with English jurisdictional rules, were retrospective so as to apply to foreign decrees granted before the introduction of the jurisdiction rule. In the result, the Court of Appeal [11] decided that the recognition rule was retrospective and the Czech decree should be recognised.

The problem was tackled in a rather different way by the House of Lords, who did not restrict themselves to the application of the *Travers* v. *Holley* rule of reciprocity, but looked, rather, at the fundamental question of what ought to be the English recognition rules for foreign divorce decrees. The conclusion was not only that the Czech decree should be recognised but also that the rules for recognition should be wider than the rules of domestic jurisdiction. The effect of the decision on the existing and newly suggested grounds of recognition must be examined.

II. The Present Position of Travers v. Holley

Apart from a number of specific statutory provisions,[12] a basic principle of recognition has been that of reciprocity, based on *Travers* v. *Holley*.[13] As was said by Somervell L.J. in the Court of Appeal in that case: "On principle, it seems to me plain that our courts in this matter should recognise a jurisdiction which they themselves claim." [14] A further gloss was added to this in *Robinson-Scott* v. *Robinson-Scott* [15] by Karminski J., who decided that the English court need not look to the basis of the jurisdiction of the foreign court, for "it is sufficient that facts exist which would enable the English courts to assume jurisdiction." [16]

No one in the House of Lords in *Indyka* seemed to doubt that the actual decision in *Travers* v. *Holley* was correct, but only a majority [17] decided that the principle expressed in that case was still good law; *i.e.*, that an English court will recognise a foreign decree of divorce if, *mutatis mutandis*, an English court would have jurisdiction to grant a divorce. Lord Reid [18] and Lord Wilberforce [19] were less sure of the merits of this principle, for they were prepared to deny recognition to a foreign decree granted

[10] [1967] P. 288.
[11] [1967] P. 288 at p. 250; noted in (1967) 30 M.L.R. 94; [1967] C.L.J. 42; (1967) 45 Can. Bar Rev. 140. The conclusions of the Court of Appeal are examined more fully in Part II, *infra*.
[12] *e.g.*, Colonial and Other Territories (Divorce Jurisdiction) Acts 1926–1950.
[13] [1963] P. 246.
[14] *Ibid.* at p. 251.
[15] [1968] P. 71.
[16] *Ibid.* at p. 88.
[17] [1967] 3 W.L.R. 510 at pp. 533–534, *per* Lord Morris, at pp. 540–541, 546, *per* Lord Pearce, at pp. 561–562, 564, *per* Lord Pearson. See now *Tijanic* v. *Tijanic* [1967] 3 W.L.R. 1568.
[18] *Ibid.* at pp. 515, 519–520.
[19] *Ibid.* at p. 559.

to a wife in circumstances which would have fallen within section 40 (1) (*b*) of the Matrimonial Causes Act 1965, in England.[20]

Even if one assumes, reasonably, that the view of the majority is to be followed, it was subjected to a qualification by Lord Pearson. He suggested that one should have regard to the character of the English legislation establishing a domestic jurisdictional rule,[21] and one should only apply the *Travers* v. *Holley* rule to domestic rules of a "general and apparently permanent character," [22] as under section 40 (1) of the Matrimonial Causes Act 1965, but not to legislation related to special or transient conditions.[23]

The application of *Travers* v. *Holley* to the actual facts of *Indyka* raises further problems, for a majority of the House of Lords judges [24] were prepared to decide *Indyka* on an application of the *Travers* v. *Holley* principle, and recognise the validity of the Czech divorce, as had been the view of the majority in the Court of Appeal.[25] This approach by three of their Lordships might lead one to conclude that the House of Lords decision is only strict authority on this single issue of the applicability of the *Travers* v. *Holley* rule to the situation raised by the facts of *Indyka*. Although all that their Lordships had to say about extending the basis of the recognition rules generally is, strictly speaking, *obiter dictum*, for it was only if the *Travers* v. *Holley* rule, as explained in the Court of Appeal, was not applicable, or if the House of Lords rejected the Court of Appeal's interpretation of the rule, that the general problem of the bases of recognition became relevant, yet it would be most unlikely that the impact of this decision would be discounted by such a device.[26]

It may be recalled that the basic issue raised by the facts of *Indyka* was one of time. The Czech court was the court of the country where W1 had resided for at least three years before her divorce was granted, and so the jurisdictional facts would seem to accord with section 40 (1) (*b*) of the Matrimonial Causes Act 1965. The problem with this view is that the English domestic jurisdiction based on three years' residence was introduced in December 1949 by the Law Reform (Miscellaneous Provisions) Act, s. 1, but the Czech decree was granted and effective by February 1949. Should recognition be given to a foreign decree granted in jurisdictional circumstances which, *mutatis mutandis*, gave rise to English jurisdiction at the time of the later English proceedings, but not at the time of the original foreign decree?

It had been suggested by Dicey that there should be no such recognition,[27] but other academic authorities are less definite, and

[20] *e.g.*, Lord Reid at pp. 519–520. [21] *Ibid.* at pp. 561–562.
[22] *Ibid.* at p. 562.
[23] And see Lord Reid, at p. 518, on the application of the *Travers* v. *Holley* principle to the, now inoperative, Matrimonial Causes (War Marriages) Act 1944.
[24] Lord Morris at p. 534; Lord Pearce at p. 546; Lord Pearson at pp. 562, 564.
[25] [1967] P. 233 at p. 250. [26] See *Angelo* v. *Angelo* [1968] 1 W.L.R. 401.
[27] *Conflict of Laws*, 7th ed. (1958), p. 822 Cf. Dicey and Morris, op. cit., p. 814.

suggest that the operative date should be that of the English recognition proceedings.[28] There is also a slightly different view put forward by Kennedy,[29] who suggests that the principle of reciprocity should be retroactive, so as to validate, in England, for example, since 1949, a divorce granted before that date, based on the wife's residence; but that this should apply only to matters arising after 1949, and, therefore, a remarriage before 1949 would be bigamous, but one after would not.[30] Such an approach would mean that the operative date is not that of the English proceedings or of the foreign divorce, but of the "matter in question," *i.e.*, in *Indyka*, that of H's marriage to W2, in 1959.

The justification for looking not at the date of the foreign proceedings, but at some later date, probably that of the English proceedings, is put clearly by Grodecki [31]—although the legislation introducing the new English jurisdictional rules was not retroactive, this does not necessarily imply that the judge-made recognition rule established in *Travers* v. *Holley* should not be retroactive. This view, though rejected by Latey J.,[32] who considered that *Travers* v. *Holley* was retroactive only to the date of the English jurisdictional legislation, *i.e.*, here December 1949, appealed to a majority in the Court of Appeal, and to a majority in the House of Lords, who approved the Court of Appeal decision, and with very little discussion of it.[33] It is proposed to examine the views of the Court of Appeal on this issue, in the light of the House of Lords approval, and, of course, of the few comments thereon by their Lordships.[34]

If one tries to evaluate the various solutions to this time problem, there are arguments both for and against the recognition rule being retrospective. One view [35] is that if a remarriage, following the divorce in question, antedates the introduction of the new English area of jurisdiction, then one cannot say that legislation not concerned directly with the marriage is able to validate later what was originally a void marriage.[36]

[28] See Webb (1958) 7 I.C.L.Q. 874 at pp. 883–884; Grodecki, 35 B.Y.B.I.L. 58 at pp. 62–63; Korah (1967) M.L.R. 278 at p. 280; Cowen and Da Costa, *Matrimonial Causes Jurisdiction* (1961), p. 86.

[29] 32 Can. Bar Rev. 359 at pp. 367–368.

[30] The suggested application of this latter view was examined in *Indyka*, by Latey J., at first instance: [1967] P. 233.

[31] 35 B.Y.B.I.L. 58 at pp. 62–63.

[32] At first instance in *Indyka*, and by Russell L.J. in the Court of Appeal.

[33] [1967] 3 W.L.R. 510 at p. 534, *per* Lord Morris, at p. 546, *per* Lord Pearce, at p. 562, *per* Lord Pearson.

[34] The Court of Appeal had little in the way of authority to guide them. There is no real discussion of this time issue in *Travers* v. *Holley* [1953] P. 246 at p. 256 itself. Such other English authority as there is tends to point to the date of the English proceedings as being the relevant date: *Arnold* v. *Arnold* [1957] P. 287; *Garwood* v. *Garwood* (1964) 108 S.J. 359; *cf. Sheldon* v. *Douglas* (*No.* 1) [1963] S.R. (N.S.W.) 442; for the later proceedings see *Sheldon* v. *Douglas* (*No.* 2) [1963] S.R. (N.S.W.) 449.

[35] Expressed by Nield J. in *Sheldon* v. *Douglas* (*No.* 1) at p. 446.

[36] *Cf. Starkowski* v. *Att.-Gen.* [1954] A.C. 155; but see also Cowen and Da Costa, *op. cit.* p. 86.

At first instance in *Indyka* v. *Indyka* [37] Latey J. accepted the retroactive effect of *Travers* v. *Holley*, but only as far as the date of the legislation of the forum on which the reciprocity was based, *i.e.*, December 1949. This view was supported by the argument that to do otherwise would cause confusion, hardship and injustice; for example, if in early 1949 H had petitioned for a declaration as to his status,[38] there would have been a declaration that he was still married. On the other hand, as Grodecki points out,[39] judge-made law is normally retroactive [40] and there is no suggestion in *Travers* v. *Holley* that the reciprocity rule there laid down should not be retroactive, even though the English legislation was not. This was the view that appealed to the majority in the Court of Appeal. Lord Denning M.R.[41] made it quite clear that there is no implied statutory enactment as to recognition, and that *Travers* v. *Holley* is entirely judge-made law. That being so, the judges can, if it is considered a desirable policy so to do, make it completely retroactive. The policy justification propounded by him was that such a conclusion would mitigate further some of the harshness of the rule that a wife's domicile is one of dependence.[42] Diplock L.J.'s reasoning was rather more involved. He suggested that the purpose and policy of the judge-made rules, both as to domestic divorce jurisdiction and recognition of foreign divorces, was to avoid "limping marriages." Hence the English courts should recognise every foreign divorce decree which they were not inhibited from recognising by the rule that our courts do *not* recognise any judgment of a foreign court given in circumstances in which, *mutatis mutandis*, the English courts themselves would not have jurisdiction.[43] He concluded that "to the extent that that inhibition is removed by the extension of the jurisdiction of the English courts themselves to decree dissolution of marriages, the public policy requires the English courts to recognise the effectiveness of decrees of dissolution of marriage pronounced by foreign courts in exercising their jurisdiction in the new circumstances which *mutatis mutandis* would entitle an English court to exercise its extended jurisdiction to dissolve a marriage." [44] Thus, if the policy be to avoid limping marriages, and the 1949 Act extends the domestic jurisdiction, then to restrict, after 1949, the judge-made rules of reciprocity would cause to limp those marriages dissolved, before December 1949, by foreign decrees on the basis of residence. Diplock L.J. considered that such a wide rule of recognition

[37] [1967] P. 233.
[38] Thereby anticipating *Har-Shefi* v. *Har-Shefi* (*No.* 1) [1958] P. 161 by four years.
[39] 85 B.Y.B.I.L. 59 at pp. 63–64.
[40] See *Keyes* v. *Keyes* [1921] P. 204.
[41] [1967] P. 233 at p. 254.
[42] *Ibid.* at pp. 254–255.
[43] Diplock L.J. preferred this rather negative definition of the rule in *Travers* v. *Holley* to the generally expressed one based on reciprocity; and see at p. 257.
[44] [1967] P. 233 at p. 259.

accorded well with this principle and with "what the common man would think was common sense." [45]

Arguments based both on common sense and the comity of nations are always appealing to the student of the conflict of laws, but is there sense or justice in granting recognition to foreign divorces obtained in circumstances which would not, at the time of their granting, have conferred jurisdiction on the English courts? The argument on "limping marriages" is attractive, but the decision of the Court of Appeal, approved by the House of Lords, can cause considerable confusion elsewhere in the family law provisions of the conflict of laws. The real difficulty with the majority view in the Court of Appeal arises when there is some other matrimonial act or proceeding, or the death intestate of one of the spouses, interposed between the date of the original divorce and the date of the new English jurisdictional legislation. As Russell L.J. asks: "What would be the effect on a *pre-1949* second marriage in England?" [46] Thus, what if H and W1 are domiciled in England, and then, in 1940, W1 leaves H and goes to live abroad. After residing in the foreign country for three years, W1 obtains a divorce from the courts of that country. In 1945 H "marries" W2 in England, erroneously believing that he is then free to do so. W2, being advised, correctly, that an English court would not recognise the foreign decree, leaves H in 1948, and, in the same year, she "remarries." Assume then that W1, domiciled in England, petitions, today, for a declaration as to the validity of her divorce. Is the effect of the 1949 Law Reform (Miscellaneous Provisions) Act, s. 1, to validate, retrospectively, the foreign divorce decree, and thus H's remarriage, and to invalidate W2's remarriage? [47]

Again, "Suppose a relevant pre-1949 decree of divorce and a pre-1949 death of the husband intestate with estate in England, not having attempted remarriage. The wife would in English law have rights to his estate accruing on his death as being his widow. Would the coming into operation of the Act of 1949 deprive her

[45] One might note that a consequence, propounded by Korah (1957) 20 M.L.R. 278 at p. 280, of holding that the "material time" is the date of the proceedings in the forum is that if the jurisdictional rules of the forum become stricter rather than more liberal, between the date of the foreign divorce and of the English proceedings, then "divorces valid here at the time they were granted, but not the subject of litigation, might become invalid." A similar consequence stems, of course, from any narrowing of the recognition rule, as seems to be advocated by Lord Reid [1967] 3 W.L.R. 510 at pp. 519–520, 526.

[46] [1967] P. 283 at p. 283. Or by the wife elsewhere, for that matter, provided H was still domiciled in England to bring English rules of capacity into play.

[47] *Cf.* Latey J. [1967] P. 283 at p. 285. It is submitted that his second example which assumes a pre-1949 declaration, by an English court, of the invalidity of a second marriage by a husband must be examined with caution. An English court cannot now grant a declaration as to the invalidity of a marriage void *ab initio*: *Kassim* v. *Kassim* [1962] P. 224, but can only grant a decree of nullity which might cause the issue of the validity of the second marriage to be considered as *res judicata* and binding *in rem*.

of those rights? And, if so, would such deprivation be limited to undistributed assets?" [48]

There seems little doubt that the Court of Appeal decision ignores these problems, whilst Latey J., at first instance, was little concerned with "limping marriages." [49] On the question of weighing these policy issues, and, perhaps, on common sense, Kennedy's view [50] leads one to a happier solution. By taking as the operative date that of the later proceedings or event, *e.g.*, remarriage, petition for a declaration, *i.e.*, the "matter in issue," which relies on the validity of the foreign divorce, it allows full retroactive effect to the *Travers* v. *Holley* rule, unless the "matter in issue" intervenes before the date of the English legislation. Despite the fact that those House of Lords judgments which consider this issue as to time state that they approve the decision of the Court of Appeal, they appear to do so in terms which refer to 1959, the date of H's remarriage, as the crucial date.[51] As Lord Morris said [52]: "The issue which the judge tried in the present case was whether the husband had been free to marry in March 1959. In my view, he was free to marry because after December 1949, our courts were entitled to treat the Czech decree of January 1949 as having dissolved the husband's first marriage."

It is to be hoped that a later court, faced with this time issue, will conclude that, although the House of Lords has approved the view that the operation of the English recognition rule based on *Travers* v. *Holley* is retrospective, the crucial date for comparison should be the date of the "matter in issue" so as to give due weight to any matrimonial proceedings or changes in status before the date of the expansion of the domestic jurisdictional rules.[53] Such an approach accords with the actual decision in *Indyka*.[54]

[48] [1967] P. 233 at p. 263.

[49] [1967] P. 233 at p. 242.

[50] 32 Can.Bar Rev. 359 at pp. 367–368.

[51] *Cf.* Lord Pearson [1967] 3 W.L.R. 510 at p. 562. It is interesting to note that in the context of the relevance of the time factor to the *lex causae*, rather than to the *lex fori*, the intervention of a later proceeding before the introduction of a retroactive law has been held to prevent the latter from having any effect: *Ambrose* v. *Ambrose* (1961) 25 D.L.R. (2d) 1; *cf. Starkowski* v. *Att.-Gen.* [1954] A.C. 155. See Dicey and Morris, Chap. 5, especially at pp. 51–52.

[52] [1967] 3 W.L.R. 510 at p. 533; see also Lord Pearce at p. 546, who considers the attitude of the English courts to this marriage as in 1959, though he does say, also, that "the question whether a foreign decree should be recognised should be answered by the court in the light of its present policy, regardless (within reason) of when the decree was granted."

[53] Though it must be conceded that this approach did not appeal either to Russell L.J., dissenting in the Court of Appeal; [1967] P. 233 at p. 263, or to the majority in the Court of Appeal.

[54] See also (1967) 45 Can. Bar Rev. 140 at p. 153; Cowen and Da Costa, *op. cit.*, p. 86. This approach would not have led to recognition of the foreign divorce in *Sheldon* v. *Douglas* (*No.* 1) (*supra*); the date of the remarriage in *Garwood* v. *Garwood* (*supra*) is not known. The new recognition principles introduced by *Indyka* may themselves create a "time problem," for they would, on the authority of *Angelo* v. *Angelo* [1968] 1 W.L.R. 401; *Peters* v. *Peters* [1967] 3 W.L.R. 1285; and *Brown* v. *Brown* [1968] 2 W.L.R. 969, appear to be retrospective. This may cause difficulty in the case of people who have relied

III. IMPACT OF INDYKA ON THE PRINCIPLES OF RECOGNITION

The result of *Travers* v. *Holley* has been that an English court would recognise a decree granted or recognised by the court of the domicile,[55] or where the facts were such that an English court would, *mutatis mutandis*, have had jurisdiction under the Matrimonial Causes Act 1965, s. 40 (1). On this principle, every change in our domestic jurisdictional rules would alter our recognition rules, for the one appeared to be a mirror image [56] of the other. The justification for this principle of reciprocity is given by Hodson L.J. in *Travers* v. *Holley* itself. "I would say that where . . . there is in substance reciprocity, it would be contrary to principle and inconsistent with comity if the courts of this country were to refuse to recognise a jurisdiction which, *mutatis mutandis*, they claim for themselves." [57]

Any justification of this rule on the grounds of comity, already shown to be suspect,[58] was rejected in *Indyka*. The principles for recognising foreign judgments, in general, are not based on comity,[59] nor does an English court require the foreign court to have *based* its exercise of jurisdiction on rules similar to the English domestic ones.[60] In the House of Lords in *Indyka*, Lord Morris rejected the reciprocity rule that we should only recognise divorces granted in circumstances when our courts could have assumed jurisdiction, saying: "There is peril in assuming that only our rules are rational and justifiable. Looking back upon the course of judicial decisions, it is readily seen that though doctrine evolved one way, it might quite easily have evolved another. This leads me to the view that no essential or fundamental superiority of our basis for jurisdiction can be claimed over all others." [61] There is no doubt that divorce jurisdiction in other countries is exercised on bases different from those in this country, and there

on the recognition rules until 1967 to order their matrimonial affairs or, say, govern the distribution of an intestate's estate to his widow. *Cf.* Puxon (1967) 111 S.J. 448.

[55] [1906] P. 135.

[56] Lord Wilberforce's expression: [1967] 3 W.L.R. 510 at p. 559.

[57] [1953] P. 246 at p. 257.

[58] Dicey and Morris, *Conflict of Laws*, 8th ed. (1967), p. 313.

[59] *Schibsby* v. *Westenholz* (1870) L.R. 6 Q.B. 155; and see Lord Hodson in *Re Tropoa Mines* [1960] 1 W.L.R. 1273 at p. 1281; though see Cheshire, *Private International Law*, 7th ed. (1965), p. 558; *Re Dulles' Settlement Trust* [1951] Ch. 842 at p. 851. Comity or reciprocity is here taken to mean, in the words of Kahn-Freund (*The Growth of Internationalism in English Private International Law*, p. 29) that "I will accept what you do as long as you act as I act." If one defines comity as "I will accept what you do as long as you accept what I do," then such a principle of comity in the context of recognition of foreign divorces does not really hold water in the light of the fact that an English court does not require the foreign court to recognise English divorces granted in similar circumstances as a prerequisite of recognition of foreign decrees. See Lord Reid in *Indyka* v. *Indyka* [1967] 3 W.L.R. 510 at p. 518.

[60] *Robinson-Scott* v. *Robinson-Scott* [1958] P.71; approved in *Brown* v. *Brown* [1968] 2 W.L.R. 969

[61] [1967] 3 W.L.R. 510 at p. 534; and see Diplock L.J. in the Court of Appeal: [1967] P. 233 at pp. 256–257.

is no reason to think that ours are the only reasonable bases of jurisdiction.[62]

A further criticism of the *Travers* v. *Holley* principle of recognition came from Lord Reid,[63] who attacked the rule for requiring the English court to recognise decrees granted abroad by the court of a wife's three years' residence in cases where the wife had no intention of making her home in that jurisdiction. The reasons for Lord Reid's dislike of a recognition rule based on reciprocity would seem to stem, in no small way, from his disapproval of the present English domestic jurisdictional rules. Having roundly condemned the latter rules,[64] it is not surprising that he condemned a recognition rule based thereon.

Another criticism of a recognition rule linked to our jurisdictional rules is that the latter are, to a large extent, statutory and some have been created piecemeal by legislation to deal with our domestic problems.[65] So one may be reluctant to accept that " the pace of recognition must be geared to the haphazard movement of our legislative process." [66] However, it is a little difficult to see what Lord Wilberforce means when saying that " it is the law as to recognition which has led, and that as to domestic jurisdiction which has followed," [67] if the proposal under examination is that our recognition rules, in future, should not slavishly accord with our jurisdictional rules.[68]

If one accepts that the policy considerations shaping recognition rules are different from those considerations which influence jurisdictional rules, then one can seek a recognition rule other than a " quasi-mathematical application in reverse of domestic legislation." [69] Having rejected the principle of reciprocity as the basis of our recognition rules, the House of Lords was not predisposed to substitute a new broader general principle in its place, though there was general, if not complete, acceptance of the fact that the new recognition rules should be broader based than the *Travers* v. *Holley* rule. The court had the freedom to create new recognition rules because the present rules were, in the main, the creation of the courts, unlike the jurisdiction rules, but, instead of stating a general principle, all five judges dealt with particular and different grounds of jurisdiction which might be recognised here. As there is little uniformity in their approach, or in the grounds of jurisdiction examined, it is virtually impossible to make a succinct statement either of the new recognition rules, or of the principles under-

[62] *Ibid.* at p. 568, *per* Lord Pearson.
[63] *Ibid.* at pp. 519–520.
[64] *Ibid.* at pp. 519, 522–524.
[65] *e.g.*, Matrimonial Causes (War Marriages) Act 1944.
[66] [1967] 3 W.L.R. 510 at p. 559, *per* Lord Wilberforce; and see Lord Reid at p. 519.
[67] *Ibid.* at p. 559.
[68] Though it must be admitted that such a development has occurred on the issue of determining the relevant time for the parties to be domiciled in the jurisdiction; see *Mansell* v. *Mansell* [1967] P. 306; *Leon* v. *Leon* [1967] P. 275. See also Lord Pearson: [1967] 3 W.L.R. 510 at p. 560.
[69] [1967] 3 W.L.R. 510 at p. 559.

lying them. Some basic propositions may, however, be stated, though somewhat tentatively.

1. The English court should not necessarily examine the *basis* of the foreign court's exercise of jurisdiction; rather, as in *Robinson-Scott* v. *Robinson-Scott*,[70] should it look at the *factual situation* of the exercise of jurisdiction, and determine whether that corresponds with the English rules. Having said this,[71] a number of their Lordships then emphasised that in relation to recognition of decrees of the court of the nationality, the fact that, as here, the foreign court exercised jurisdiction on the *basis* of nationality was relevant to a decision as to recognition of its decree.[72] If the recognition rules are to be wider than the domestic rules, then although one can argue that any decree granted in circumstances where an English court would have granted one should be recognised, irrespective of the basis of the foreign exercise of jurisdiction, yet if one is going to recognise foreign decrees on grounds other than those for domestic jurisdiction, there may be some justification for defining such extended recognition rules in terms requiring the foreign court to have exercised its jurisdiction on certain specified bases.[73]

2. The English court should not be concerned with the *grounds* for divorce in the foreign court.[74] If the English court is not to be concerned with the basis of jurisdiction of the foreign court or the grounds of divorce therein, then the problem, referred to by Lord Reid,[75] of reluctance to accept as valid the various grounds on which foreign courts claim jurisdiction or grant divorces would hardly seem to arise,[76] except as an instance of refusal of recognition on general grounds of policy.[77]

3. If our recognition rules are narrower than our domestic jurisdiction rules, this adds to the number of "limping marriages," and so our recognition rules, though not a mirror image[78] of our jurisdictional rules, should be closely related to them, and

[70] [1968] P. 71.
[71] [1967] 3 W.L.R. 510 at p. 525, *per* Lord Reid, at p. 562, *per* Lord Pearson; *cf.* the New Zealand Matrimonial Proceedings Act 1963, s. 82 (1) (*b*).
[72] *Ibid.* at pp. 545–546, *per* Lord Pearce, at p. 563, *per* Lord Pearson; see Part IV, *infra*.
[73] See the New Zealand Matrimonial Proceedings Act 1963, s. 82 (1) (*b*); *cf.* the Australian Matrimonial Causes Act 1959, s. 95.
[74] [1967] 3 W.L.R. 510 at p. 525, *per* Lord Reid, at pp. 531–532, *per* Lord Morris, approving *Bater* v. *Bater* [1906] P. 209; and see Lord Denning M.R. in the Court of Appeal in *Indyka* [1967] P. 233 at p. 255. See *Tijanic* v. *Tijanic* [1967] 3 W.L.R. 1566, 1568; *Brown* v. *Brown* [1968] 2 W.L.R. 969.
[75] *Ibid.* at p. 525.
[76] Despite his view, at p. 525, as to the irrelevance of the grounds of divorce, he seems, at p. 526, to consider the grounds of divorce relevant to the issue of recognition.
[77] See Part IV, *infra*. There is no reported case of a divorce decree being refused recognition on this ground: see Dicey and Morris, *Conflict of Laws*, 8th ed., pp. 317–318, though see *Burke* v. *Burke* [1955] C.L.Y. 863. There has been refusal of recognition of foreign *nullity* decrees on these grounds: Dicey and Morris, p. 377.
[78] [1967] 3 W.L.R. 510 at p. 559, *per* Lord Wilberforce.

should, if anything, be wider."[79] This should reduce the number of marriages caused to "limp."[80] It will not eliminate them, because an English court neither will, nor should, recognise all foreign decrees of divorce,[81] nor, as Lord Reid pointed out,[82] will foreign courts necessarily recognise all English divorce decrees. One can but strive for greater uniformity in the matter of recognition.[83]

4. A majority of the House of Lords[84] considered that an English court should recognise any decree granted by a foreign court in circumstances such that, *mutatis mutandis*, an English court would have assumed jurisdiction, *i.e.*, the *Travers* v. *Holley* rule,[85] and all five judges agreed that there are other, not clearly defined, grounds of jurisdiction in the foreign court which may be recognised here.[86]

IV. Impact of Indyka on the Specific Recognition Rules

The effect of the varied comments in the House of Lords on the bases or circumstances of jurisdiction of a foreign court which will be recognised in England will be considered with reference to each possible ground of jurisdiction, against the background of the law before this case.

(a) *Pre-Indyka*

The basic position before this case was that "a foreign divorce will be recognised in England:

> "(1) if the parties are domiciled in the foreign country at the commencement of the proceedings for divorce;

[79] *Ibid.* at p. 542, *per* Lord Pearce, at pp. 557, 559, *per* Lord Wilberforce.

[80] *Ibid.* at p. 535, *per* Lord Pearce. Lord Reid, at pp. 524–525, recommends expansion of the existing recognition rules to avoid limping marriages, yet proposes, at pp. 519–520, 526, that, in some circumstances, the *Travers* v. *Holley* rule should be restricted, thus creating new circumstances where marriages "limp." Any restriction of *Travers* v. *Holley* is rejected, and rightly so it is submitted, by Lord Pearce at pp. 542–548 (and see Lord Pearson at p. 564), because of the hardship and difficulty this would cause, and on the grounds that if a wife is prepared to go abroad for three years to acquire a divorce on grounds not recognised here, there cannot be much left of a marriage to justify its continuing to "limp" in England. Thus, as Lord Pearce said at p. 548, "I would regard the possibilities of wives going abroad for three years to secure relief as insufficient to outweigh the advantages of the rule in *Travers* v. *Holley*."

[81] See *Indyka* at first instance: [1967] P. 233 at p. 242.

[82] [1967] 3 W.L.R. 510 at p. 519.

[83] As has been recommended by the Tenth Session of the Hague Conference on Private International Law (1964); see *Actes et Documents de la Dixième Session*, Tome I; Graveson (1965) 14 I.C.L.Q. 528 at pp. 550–554; and see the Second Annual Report of the Law Commission, 1966–67, Law Com. 12, pp. 17–18.

[84] [1967] 3 W.L.R. 510, *per* Lord Morris at p. 533, *per* Lord Pearce at pp. 540–541, *per* Lord Pearson at pp. 561–562, 564; *cf.* Lord Reid at pp. 519–520, Lord Wilberforce at p. 559.

[85] See Part II, *supra*. This view has since been taken by Sir Jocelyn Simon P. in *Tijanio* v. *Tijanio* [1967] 3 W.L.R. 1566; and see *Brown* v. *Brown* [1968] 2 W.L.R. 969.

[86] See Part IV, *infra*.

" (2) if the divorce would be recognised by the courts of the country where at the commencement of the proceedings the parties are domiciled;

" (3) if the wife obtains a divorce in a foreign country, and the husband is domiciled elsewhere, and the High Court would (*mutatis mutandis*) have had jurisdiction to grant her a divorce under [Matrimonial Causes Act 1965, s. 40 (1)] ;

" (4) if the divorce is granted by the courts of any country to which the Colonial and Other Territories (Divorce Jurisdiction) Acts 1926–1950 apply and the parties are British subjects domiciled in England, Scotland or Northern Ireland and the divorce is registered in the United Kingdom;

" and not otherwise." [87]

(b) *The effect of Indyka* [88]

(1) *Domicile.* Although harsh words were said [89] about the English concept of domicile, both because of the strictness of the concept as evidenced by *Winans* v. *Att.-Gen.*[90] and *Ramsey* v. *Liverpool Royal Infirmary* [91] and because of the rule that a wife acquires her husband's domicile for all purposes, there was general agreement that any divorce granted by the court [92] of the domicile of husband and wife should be recognised in England.[93] There are three sub-issues to consider here. First, the House of Lords accepted the continuing predominance of the law of the domicile as governing status, for express approval was given to the rule in *Armitage* v. *Att.-Gen.*[94] that recognition will be afforded to a foreign divorce if it would be recognised as valid in the court of the parties' domicile.[95] Secondly, whilst it seemed to be accepted that the English domestic rule that a wife takes her husband's domicile should only be altered by Parliament,[96] Lord Reid was prepared to extend the effect of domicile to allow recognition of a decree granted by a court of a previous domicile,[97] for he said: " where a husband leaves his wife in the matrimonial domicile and she had by the law of that country a right to obtain a divorce which accrued before he changed his domicile but only sues for

[87] Dicey and Morris, *op. cit.*, pp. 308–309, *cf.* First Supplement.
[88] See *Practice Direction* (*Probate: Recognition of Foreign Decree*) [1968] 1 W.L.R. 286.
[89] [1967] 3 W.L.R. 510 at pp. 537–538, *per* Lord Pearce, at p. 551, *per* Lord Wilberforce.
[90] [1904] A.C. 287. [91] [1930] A.C. 588.
[92] It is proposed to discuss recognition in terms of divorces granted by *courts* in the jurisdiction under examination simply for ease of exposition, and because there is no discussion of extra-judicial divorces in the House of Lords; see below.
[93] [1967] 3 W.L.R. 510 at p. 525, *per* Lord Reid, at p. 531, *per* Lord Morris, at p. 541, *per* Lord Pearce, at p. 557, *per* Lord Wilberforce, and at p. 563, *per* Lord Pearson. See *Peters* v. *Peters* (1968) 112 S.J. 311.
[94] [1906] P. 135.
[95] [1967] 3 W.L.R. 510 at p. 532, *per* Lord Morris, at p. 541, *per* Lord Pearce, at p. 557, *per* Lord Wilberforce.
[96] *Ibid.* at p. 515, *per* Lord Reid, at p. 557, *per* Lord Wilberforce.
[97] In the English sense.

and obtains her divorce thereafter, we ought to disregard that change of domicile and recognise the foreign decree." [11] This deals with the type of situation which, if the husband's conduct amounted to desertion, would be covered by section 40 (1) (*a*) of the Matrimonial Causes Act 1965, so far as English jurisdiction is concerned. However, as Lord Reid's example is not co-extensive with the cases covered by section 40 (1) (*a*) his proposition would seem to be unhelpful if one accepts the view, propounded by a majority of the House of Lords,[11] that the English courts should recognise decrees granted in circumstances where, *mutatis mutandis*, the English court would have had jurisdiction. Although much of the discussion of this, the *Travers* v. *Holley* rule, is in the context of recognition of decrees granted to a wife resident for three years within the jurisdiction, as under section 40 (1) (*b*), yet there would seem to be little doubt that a foreign decree granted in circumstances similar to section 40 (1) (*a*) would also be recognised.[1]

Thirdly, Lord Pearson was prepared to go further than has been the rule as to recognition of decrees of the domicile and recognise a decree granted by a court of the domicile, domicile being defined not in the English sense, as is usual,[2] but " according to some less exacting definition." [3] What is not clear is whether this refers to an alteration and relaxation of the English definition or whether it refers to a foreign concept of domicile less rigid than ours. If the latter, then the English courts will have to decide which foreign concepts of domicile, though not such as to satisfy our domestic jurisdictional rule, are adequate for the purposes of our recognition rule. It would appear from further comments by Lord Pearson [4] that this " lesser domicile " is something more than residence, but how much more is none too clear. The criterion taken by him is that the " broad distinction is between a person who makes his home in a country and a person who is a mere sojourner there. A person may be appointed to some diplomatic or military or commercial post in a foreign country and serve there for three or more years without becoming either dissociated from the community of his home country or associated with the community of the foreign country." [5] Furthermore, Lord Pearson recommended recognition of divorces granted by the court of the wife's own separate domicile, for he suggested that " if the law of the other country concerned enables a wife living apart from her husband to retain or acquire a separate qualification of . . . domicile

[11] [1967] 3 W.L.R. 510 at p. 526.
[11] Lords Morris, Pearce and Pearson, but not Lord Reid.
[1] See especially Lord Pearson at p. 562. *Travers* v. *Holley* itself was a case concerned with similarity with s. 40 (1) (*a*).
[2] *Collier* v. *Rivas* (1841) 2 Curt. 855; *Bremer* v. *Freeman* (1857) 10 Moo.P.C. 306; *Re Annesley* [1926] Ch. 692; Dicey and Morris, pp. 117–118.
[3] [1967] 3 W.L.R. 510 at p. 563.
[4] *Ibid.* at p. 564.
[5] *Ibid.*

for the purpose of suing for divorce, and the jurisdiction has been exercised on the basis of that qualification, that would not, normally at any rate, be a reason for refusing recognition." [6]

(2) *Residence.* Here there seems to be a fairly clear division of opinion in the House of Lords, especially as to the problem dealt with by *Travers* v. *Holley*, *i.e.*, reciprocal recognition of jurisdiction exercised when a wife has been resident three or more years within the jurisdiction. Those who expressed doubts about the decision in *Travers* v. *Holley* also had doubts about residence as a jurisdictional requirement. Thus Lord Wilberforce considered that it was not necessary or really desirable to allow recognition *generally* to decrees based on non-domiciliary residence of the spouses, but that recognition in particular circumstances might be acceptable. He concluded that recognition might be given to decrees granted on a residence basis " in the particular case of wives living apart from their husbands where to subject them uniquely to the law of their husband's domicile would cause injustice, and where the jurisdiction of the court of the country of residence is appropriate." [7]

A number of comments might be made here. First, the statement applies only to the residence of a wife. This is justified [8] on the grounds that it is the wife who needs mitigation of the consequences of the basic rule of reference to the court of the domicile, the husband having the right and the power to change their domicile. The more limited the rules of recognition, the greater the justification for this distinction, but if we are to recognise divorces granted on the basis of a wife's acquisition of a separate domicile in a foreign country for the purposes of divorce proceedings [9] or a decree granted in the country of either party's nationality,[10] then refusal to recognise a decree granted on the basis of a husband's residence begins to appear discriminatory. Secondly, Lord Wilberforce's remarks would seem to suggest as a prerequisite of recognition that the *basis of the jurisdiction* of the foreign court should have been residence.[11] Thirdly, both he and Lord Reid suggested that jurisdiction exercised on the basis of residence alone is not enough, for they considered that there are other factors to consider, such as the quality of the residence and the nationality of the parties.[12]

Thus, a decree granted by a court of a country where the wife had resided for three years should not necessarily be recognised.[13] Though the fact of residence might be relevant to the exercise of some other ground of recognition, Lord Reid was reluctant to allow it to be considered a general ground in itself.

[6] *Ibid.* at p. 563.
[7] *Ibid.* at p. 557.
[8] *Ibid.* at p. 558; and see Lord Pearce, a *Travers* v. *Holley* supporter, at pp. 543–544
[9] *Ibid.* at p. 563, *per* Lord Pearson.
[10] Discussed *infra*.
[11] [1967] 3 W.L.R. 510 at p. 557.
[12] *Ibid.* at p. 527, *per* Lord Reid, and at p. 558, *per* Lord Wilberforce.
[13] *Ibid.* at pp. 519–520, 527.

Those judges, the majority, who accepted the decision in *Travers* v. *Holley* had rather less difficulty with the issue of residence as a ground of recognition. Lord Morris,[14] with whom Lord Pearce [15] and Lord Pearson [16] agreed, accepted that it was desirable to recognise foreign decrees granted in circumstances similar to those where an English court would, *mutatis mutandis*, have assumed jurisdiction. We should, therefore, recognise a decree granted to a wife resident in the foreign jurisdiction for three years, the basis of the foreign court's exercise of jurisdiction not seeming to be relevant. The problem which the majority's view poses is whether residence outside the factual situation envisaged by section 40 (1) (*b*) should be recognised, *i.e.*, should jurisdiction based on less than three years' residence by the wife [17] or on the residence for three or fewer years by the husband [18] suffice. Lord Pearson declined to resolve these problems, merely commenting that they caused "a difficulty" [19]; and Lord Pearce,[20] whilst considering that the residence of the wife only was relevant,[21] preferred to leave the issue of the length of residence open, to be resolved by the courts, thereby adding further uncertainty to a branch of the law where certainty is highly desirable. He did, however, show that residence is to be accorded little more importance than in the past, for express approval [22] was given to the decision in *Mountbatten* v. *Mountbatten*,[23] where Davies J. refused to combine the rules in *Travers* v. *Holley* and *Armitage* v. *Att.-Gen.*[24]

(8) *Nationality*.[25] There was general acceptance that decrees granted by the court of the nationality might be recognised in England. A number of separate questions are involved in such a conclusion, *e.g.*, whose nationality is relevant? Must the decree be by the court of the nationality of both parties? Must jurisdiction have been exercised by the foreign court on grounds of nationality? How does one deal with problems of dual nationality or problems created by countries with one nationality and several law districts? One of the drawbacks of the House of Lords discussion of nationality as a basis of recognition is that these problems are not really examined,[26] and the brevity of the examination itself leads to further difficulties. Thus Lord Pearce [27] concluded that decrees of the court of the nationality should be recognised

[14] *Ibid.* at pp. 533–534.
[15] *Ibid.* at pp. 543–545.
[16] *Ibid.* at p. 564.
[17] *Dunne* v. *Saban* [1955] P. 178.
[18] *Lovett* v. *Lovett and Smith* [1957] P. 156.
[19] [1967] 3 W.L.R. 510 at p. 564.
[20] *Ibid.* at p. 545; and see Lord Reid at p. 527.
[21] *Ibid.* at pp. 543–544.
[22] *Ibid.* at p. 545.
[23] [1955] P. 43.
[24] [1906] P. 135.
[25] It is a little surprising that the one reported English decision which lends some support, albeit obscurely, to recognition of decrees of the court of the parties' nationality, *Mezger* v. *Mezger* [1937] P. 19 at pp. 22–25, 28–29, was neither discussed in the House of Lords, nor, apparently, cited to the court.
[26] See, *e.g.*, [1967] 3 W.L.R. 510 at p. 534, *per* Lord Morris.
[27] *Ibid.* at pp. 545–546, with whom Lord Pearson agreed at p. 563.

" when jurisdiction is taken on the ground of nationality," [28] as here. He supported this view with the authority of the Report of the Royal Commission on Marriage and Divorce [29] and this really confuses the issue as Lord Pearce refers to recognition of foreign divorces where jurisdiction is taken on the basis of nationality, whilst paragraph 857 of the Report merely refers to divorces obtained by a spouse in accordance with the law of a country of which either or both spouses were nationals at the time of the proceedings. It says nothing of the bases of jurisdiction involved.[30]

This general approval of the recommendations of the Royal Commission on Marriage and Divorce on the nationality issue involves approval of the extension of the rule in *Armitage* v. *Att.-Gen.*[31] to the sphere of nationality so that an English court should recognise a decree which is recognised by the country of either spouse's nationality.[32]

Lord Pearson [33] went rather further on the general issue of nationality and suggested that if a wife is allowed a separate nationality, for the purpose of suing for divorce, jurisdiction exercised on that basis should be recognised. He seemed to regard the problems of multi-state or federal nationality as of little importance because such states would not exercise jurisdiction on the basis of nationality. The problem remains, however, if our recognition rule is not related to the basis of the foreign court's exercise of jurisdiction. He did impose the *caveat* on nationality as a ground of recognition that an English court might refuse to recognise a decree granted on the basis of nationality if that nationality had been acquired temporarily, for the purpose of obtaining a divorce,[34] or if, as he said,[35] " there was no longer any real and substantial connection between the petitioner and the country of his or her nationality." [36]

On the other hand, Lord Wilberforce [37] and Lord Reid [38] were even less definite, and not at all enthusiastic, about recognition of

[28] *Ibid.* at p. 545.
[29] (1956) Cmnd. 9678; and see therein the Draft Code, Cl. 7 (*b*). See [1967] 3 W.L.R. 510 at p. 546.
[30] Lord Pearce's suggestion at p. 546 that his approach would have produced a more satisfactory result in *Lovett* v. *Lovett and Smith* [1957] P. 156, by relying on nationality as a connecting factor, raises a complication. It suggests not only that just one of the parties need be a national of the country in question, for in *Lovett* the decree was granted by a German court to the husband, a British national, the wife being German, but also that the basis of the foreign court's exercise of jurisdiction is irrelevant. It would appear in that case that the decree was granted on the basis of residence within the jurisdiction, and there is no reference to nationality as a basis. Such a situation hardly accords with Lord Pearce's comments as to jurisdiction exercised on the basis of nationality.
[31] [1906] P. 135.
[32] Report of the Royal Commission on Marriage and Divorce, para. 857, and Draft Code, Cl. 7 (*b*).
[33] [1967] 3 W.L.R. 510 at p. 568.
[34] See the discussion of " Qualifications on recognition," *infra*.
[35] [1967] 3 W.L.R. 510 at p. 564.
[36] As might be said of the husband, though not of the wife, in this case.
[37] [1967] 3 W.L.R. 510 at pp. 557–558.
[38] *Ibid.* at p. 527.

divorce decrees of the courts of the parties' nationality. Lord Wilberforce was prepared to recognise the factor of nationality, though without deciding whether the nationality of both spouses, or only of one, was relevant. However, he seemed to consider nationality as a factor which, like residence, is relevant to recognition, but not necessarily alone. It is not clear whether he would recognise a decree granted on the basis of nationality without further connection with the jurisdiction.[39]

The consequence of the variety of the statements on nationality as a connecting factor is that though one now knows it to be relevant to the issue of recognition there must still be great uncertainty as to such questions as whether the nationality of both parties must be taken into account or whether the foreign court must have exercised jurisdiction on the basis of nationality. The courts have been " left to deal with the problems as and when they arise " [40]; this makes the task of advising people as to their marital status, at the moment, very difficult without resort to declaratory relief.

(4) *Matrimonial home.* This jurisdictional basis appealed to Lord Reid [41] alone, who considered that recognition should be given to a divorce decree granted, to husband or wife, by the court of the matrimonial home. He extended this to include recognition of a divorce granted, by the courts of the country of the matrimonial home, to a wife who has remained within that jurisdiction after her husband has left her.[42] The concept of the matrimonial home is one which has met with little general approval in the English conflict of laws,[43] though it may well be easier to determine the matrimonial home than to decide whether there was sufficient *animus manendi* for the acquisition of a domicile of choice.[44]

(5) *Place of celebration of the marriage.* This is a connecting factor which was not really canvassed in the House of Lords [45] and any views that it should have been have now been shown to be misplaced by the decision of Wrangham J. in *Peters* v. *Peters.*[46] Here H and W1 married in Yugoslavia in 1946 and they came to England in 1947, became domiciled here at all material times, and became naturalised British subjects in 1949, though H still often visited Yugoslavia. In 1960 they separated and in 1962, by arrangement with H, W1 went to Yugoslavia and a Yugoslav

[39] *Ibid.* at p. 558.
[40] *Ibid.* at p. 534, *per* Lord Morris; and see *Angelo* v. *Angelo* [1968] 1 W.L.R. 401.
[41] *Ibid.* at p. 527, though Lord Pearce, at p. 546, Lord Wilberforce, at p. 547 and Lord Pearson at p. 565 do mention the fact.
[42] *Ibid.* at p. 527. [43] *e.g.*, *Sinclair* v. *Sinclair* [1967] 3 W.L.R. 1540.
[44] [1967] 3 W.L.R. 510 at p. 528. See Webb (1967) 16 I.C.L.Q. 997 at pp. 1011–1012 for a discussion of some of the further problems raised by the concept of the matrimonial home.
[45] Though see Lord Pearson's reference to it at p. 565; and see Lord Reid at p. 520; and see *Peters* v. *Peters* [1967] 3 W.L.R. 1235 at p. 1238.
[46] [1967] 3 W.L.R. 1235; Webb (1968) 17 I.C.L.Q. 209.

court granted her a decree of divorce on the grounds of desertion, exercising jurisdiction principally on the basis that the marriage had been celebrated in Yugoslavia. The spouses returned to England and H remarried. This second marriage was dissolved [47] in 1967. W1 now petitioned either for a declaration that the Yugoslav divorce decree was valid or for a decree of divorce. One of the arguments propounded for recognition of the Yugoslav decree was that it was a decree of the court of the *locus celebrationis*. This argument was rejected. Wrangham J. considered that although a result of *Indyka* may have been that English courts should recognise a foreign decree whenever there was a real and substantial connection between the petitioner and the foreign court,[48] that connection was not provided by celebration of the marriage in the foreign country.

(6) *Statutory grounds.* There is no reason to believe that the House of Lords desired any alteration, by Parliament of course, of the statutory bases of recognition under the provisions of the Colonial and Other Territories (Divorce Jurisdiction) Acts 1926–1950.[49] Such references as there are to this legislation seem to express approval.[50]

(7) *Other factors.* Various other factors, tending to show a substantial connection with the jurisdiction whose decree is in question, were referred to by their Lordships, with special reference to the facts of the actual case. Thus Lord Pearce [51] and Lord Pearson [52] made mention of the fact that the husband, and therefore the wife, had been domiciled in Czechoslovakia some years prior to the divorce proceedings in question. The relevance of such earlier domicile or nationality has now been rejected, at least in the absence of some more substantial connecting factor, in *Peters* v. *Peters.*[53] In that case the court refused to find a necessary connection with Yugoslavia from the fact that the spouses had been domiciled there and had been Yugoslav nationals at the time of their marriage there, for they had later become domiciled in England and naturalised British subjects and that was their position at the relevant date, that of the foreign divorce proceedings.

(8) *Qualifications on recognition.* There was general agreement [54] that, no matter how the basic principles or rules of recognition should be extended, recognition of any foreign decree of divorce

[47] Whereas, as will be seen, it should have been annulled.
[48] Consideration of the requirement of real and substantial connection is to be found *infra*.
[49] See Dicey and Morris, pp. 315–317.
[50] [1967] 3 W.L.R. 510 at p. 541, *per* Lord Pearce; see also on the effect of this legislation on the domestic jurisdictional rules Lord Reid at p. 524, Lord Wilberforce at p. 552.
[51] *Ibid.* at p. 546.
[52] *Ibid.* at p. 565.
[53] *Supra.*
[54] [1967] 3 W.L.R. 510 at p. 531, *per* Lord Morris, at p. 544, *per* Lord Pearce, at p. 563, *per* Lord Pearson.

should be subject to the existing, albeit very limited,[55] qualifications that the foreign divorce must not be vitiated by fraud [56] or contrary to natural or substantial justice.[57]

Indyka would seem to provide a further qualification to any rules of recognition, in the requirement that recognition should be given only to decrees granted by a country with which the petitioner had a "real and substantial connection." [58] This is only vaguely defined in the judgments and it is not too easy to decide how to place this factor in any conceptual analysis of recognition rules. The judgment of Lord Wilberforce [59] would suggest that substantial connection is the basis of the recognition rule and that one looks at factors such as residence and nationality in order to determine whether there was sufficient connection. On this view there is no general rule that, *e.g.*, we should recognise decrees of the court of the parties' nationality. On the issue of decrees granted by a court of a petitioning wife's residence, he considered that we should "recognise divorces given to wives by the courts of their residence wherever a real and substantial connection is shown between the petitioner and the country, or territory, exercising jurisdiction. I use these expressions so as to enable the courts, who must decide each case, to consider both the length and quality of the residence and to take into account such other factors as nationality which may reinforce the connection." [60]

Lord Wilberforce gave a further justification for this approach by saying that it would "enable the courts (as they habitually do without difficulty) to reject residence of passage or residence, to use the descriptive expression of the older cases, resorted to by persons who properly should seek relief here for the purpose of obtaining relief which our courts would not give." [61] This view that divorces granted to "birds of passage" [62] should not be recognised commended itself to Lords Pearce, Pearson and Morris and they proposed that an English court should refuse to recognise a decree granted to a wife who has obtained a temporary nationality or fictitious domicile [63] or just gone abroad for three years [64] to obtain a divorce. Their approach to this problem was that lack of

[55] Dicey and Morris, pp. 317–319.
[56] *e.g.*, *Middleton* v. *Middleton* [1967] P. 62.
[57] *viz.*, *Gray* v. *Formosa* [1963] P. 259 at p. 271; and see also *Burke* v. *Burke* [1965] C.L.Y. 868.
[58] [1967] 3 W.L.R. 510 at p. 534, *per* Lord Morris.
[59] *Ibid.* at pp. 558–559; and see Wrangham J. in *Peters* v. *Peters*, *supra*, and see *Brown* v. *Brown* [1968] 2 W.L.R. 969, 972. See Dicey and Morris, *op. cit.*, First Supplement.
[60] *Ibid.* at p. 558.
[61] *Ibid.*; and see *Le Mesurier* v. *Le Mesurier* [1895] A.C. 517 at p. 518. On the meaning of "residence" under s. 40 (1) (*b*) see Dicey and Morris, p. 301; Cheshire, *Private International Law*, 7th ed., p. 336; McClean, "The Meaning of Residence" (1962) 11 I.C.L.Q. 1158 at pp. 1162–1165.
[62] *Arnold* v. *Arnold* [1957] P. 237 at p. 258; cited by Lord Pearson: [1967] 3 W.L.R. 510 at p. 564.
[63] [1967] 3 W.L.R. 510 at p. 564, *per* Lord Pearson.
[64] *Ibid.* at p. 544, *per* Lord Pearce; and see Lord Reid at p. 520.

substantial connection is a qualification of the rules of recognition, not that, as Lord Wilberforce suggested, there is a positive requirement of substantial connection, as to which residence and nationality are but factors.

It is in this context that their Lordships seemed prepared, also, to make inroads into the general rule that English courts do not normally look at the basis of jurisdiction of the foreign court nor at the grounds of divorce. This would seem now to be subject to some qualification. Lord Pearce [65] suggested that where the divorce could not be said to be genuine according to our notion of divorce, then the grounds of divorce can be examined,[66] and he gave as an example a divorce granted on the grounds of incompatibility of temperament with jurisdiction taken on one day's residence.[67] In such circumstances the courts are merely " purveying divorce to foreigners who wish to buy it; and that does not accord with our notions of genuine divorce," [68] and the English courts should have a discretion not to recognise such divorces. This presupposes, however, that they are granted in jurisdictional circumstances where our courts could recognise them. This means, presumably, that a wife who resides for three years in Chihuahua for the purpose of obtaining a divorce in jurisdictional circumstances similar to section 40 (1) (*b*) will be likely to have her divorce refused recognition after *Indyka*, *i.e.*, this qualification involves a more restrictive approach to recognition, for the qualification can only apply if there was, in general, a basis for recognition.[69]

It would not seem that their Lordships intended to alter the general rule that English courts will recognise non-judicial divorces,[70] granted according to the law of the parties' domicile.[71]

[65] *Ibid.* at p. 544; and see Lord Pearson at p. 564.

[66] And see Lord Reid at pp. 525, 526.

[67] As in the Mexican State of Chihuahua; see *Mountbatten* v. *Mountbatten* [1959] P. 43. See Dicey and Morris, *op. cit.*, First Supplement.

[68] [1967] 3 W.L.R. 510 at p. 544.

[69] Such an approach is close to acceptance in English law of a doctrine of evasion or *fraude à la loi*. This concept, though familiar to American and continental conflicts lawyers, has so far been rejected by English law, except possibly in the field of contract. See Graveson, " The Doctrine of Evasion of the Law in England and America " (1937) 19 *Journal of Comparative Legislation* 21; Graveson, " Comparative Aspects of the General Principles of Private International Law " (1963) 109 *Recueil des Cours de l'Académie de Droit International*, Chap. 4.

[70] Dicey and Morris, pp. 319–321.

[71] *Cf.* the New Zealand Matrimonial Proceedings Act 1963, s. 82 (1), which refers to " any decree or order or legislative enactment for divorce . . . made . . . by a court or legislature." Administrative divorces such as in *Manning* v. *Manning* [1958] P. 112 and religious divorces by *talak* or *gett* are, presumably, only recognised by virtue of s. 82 (2), which preserves the validity of any foreign divorce which would be recognised apart from s. 82 (1); see Webb, " Divorce and Nullity " (1966) 2 N.Z.U.L.R. 145 at pp. 146–147. The relevant Australian legislation, the Matrimonial Causes Act 1959, s. 95 (2), refers to recognition of divorces " effected in accordance with the law of a foreign country," which is expanded in s. 95 (8) to refer to divorces effected " by decree, legislation or otherwise "—thereby allowing full recognition of extra-judicial divorces; see Cowen and Da Costa, *Matrimonial Causes Jurisdiction* (1961), pp. 81–82, 100.

If the English rules as to recognition of non-judicial divorces apply to recognition of *all* non-judicial divorces given in jurisdictional circumstances where recognition would be granted had the divorce been by judicial decree, then further problems arise from *Indyka*. Some support for the proposition that an extra-judicial divorce granted other than in the country of the parties' domicile, *e.g.*, in the country where the wife has resided for three years,[72] should be recognised may be gathered from *Manning* v. *Manning*,[73] where recognition was given to a Norwegian divorce by administrative process to a wife domiciled in England but resident for three years in Norway. If, after *Indyka*, the English courts are to refer, in relation to some of the new relevant jurisdictional facts, to the basis of the foreign court's assumption of jurisdiction, as in the case of nationality,[74] this would exclude recognition of non-judicial divorces granted in the country of the parties' nationality. So, if H and W, both Moslems domiciled in England, were divorced by a religious procedure in Egypt, of which country they were nationals, it being a provision of Egyptian law that divorce there by *talak* is valid if the parties are Egyptian citizens,[75] then should this divorce be denied recognition in England simply because of its non-judicial nature? What would be the position if this *talak* was performed in England, where the parties are domiciled, but was regarded as valid under the law of their nationality? The Report of the Royal Commission on Marriage and Divorce, of which some of their Lordships expressed approval,[76] recommends recognition of divorces which would be recognised by the law of the parties' nationality.[77] It is submitted that the recognition of extra-judicial divorces should not be limited only to some of the grounds of recognition of foreign judicial decrees.

(9) *Interrelation of grounds of recognition.* The interrelation of various grounds of jurisdiction of a foreign court which might lead to recognition in England is to be seen in *Angelo* v. *Angelo*.[78] Here H and W married in England in 1960. H was, and remained at all times, domiciled in England and a British national. W was a German national. They lived in France after their marriage

[72] On an analogy with the Matrimonial Causes Act 1965, s. 40 (1) (b).
[73] [1958] P. 112.
[74] When discussing this ground, Lord Pearce ([1967] 3 W.L.R. 510 at p. 545) refers to recognition of "decrees of the court of the nationality, when jurisdiction is taken on the ground of nationality"; and see Lord Pearson at p. 563, who refers to the foreign court exercising jurisdiction on the *basis of domicile or nationality*.
[75] Ryan, 32 Can. Bar Rev. 1027 at pp. 1031–1032.
[76] [1967] 3 W.L.R. 510 at p. 534, *per* Lord Morris, at pp. 542–543, 545–546, *per* Lord Pearce, at p. 563, *per* Lord Pearson.
[77] Paras. 861–865 and Draft Code cl. 7 (b); *cf. Russ* v. *Russ* [1964] P. 315 at p. 335, where Donovan L.J. suggested that an English court should not recognise any attempt to obtain a divorce in England other than by judicial process, though see *Har-Shefi* v. *Har-Shefi (No. 2)* [1953] P. 220.
[78] [1968] 1 W.L.R. 401, Webb (1968) 17 I.C.L.Q. 209.

until 1962 when W returned to Germany and refused to live with H. In 1963, W obtained a divorce from a German court on the jurisdictional basis of her German nationality and habitual local residence.[79] In December 1966, H petitioned, in England, for a divorce but, after the House of Lords decision in *Indyka*, he was given leave to amend and he petitioned for a declaration that his marriage had been validly dissolved by the 1963 German decree. This raised the issue of recognition of a decree granted by the court of one party's nationality after six months' residence within that jurisdiction.

Ormrod J. examined various bases of recognition suggested by the House of Lords in *Indyka* and seemed to conclude that the German decree fulfilled the tests there laid down. In fact, the only relevant tests are those of residence and nationality. This decree was not granted by the court of the matrimonial home,[80] for that was in France, nor by the court of W's domicile, in the English sense, and it does not appear to have been decided that W had acquired a separate German domicile, under German law, for the purpose of suing for divorce. Furthermore, it does not appear to have been decided in the English or German courts that she was domiciled in Germany according to a definition of domicile less exacting than the English one, for the German court exercised jurisdiction on the basis of residence and nationality.

It is a little difficult to estimate the effect of Ormrod J.'s decision to recognise the German decree. If one was to say that the decision is authority for the view that a decree granted by a court of the country of the petitioner's nationality should be recognised, this would be wholly acceptable and help to resolve some of the doubts as to recognition of decrees of the court of the nationality. It would now be clear that the nationality of one party alone, the petitioner, would be a sufficient connecting factor. However, in considering the judgments of the House of Lords on the issue of nationality, Ormrod J. refers to the statements of Lord Pearce [81] and Lord Pearson [82] that a decree of the court of the nationality will be recognised, *if granted on that basis*; if this decision lends support to the view that this is a necessary requirement, then it is to be regretted. What is also unclear is whether six months' residence, in the absence of the factor of nationality, would suffice as a basis for recognition. It is submitted that it ought not to. Furthermore, it is to be hoped that the decision is not taken to lend support to the view of Lord Wilberforce [83] that the criterion for recognition is the very vague one of real and substantial connection, *i.e.*, some combination of the factors of residence and

[79] About six months.
[80] Ormrod J., considered, at p. 408, as relevant that part of Lord Reid's judgment which referred to jurisdiction based on a wife's residence.
[81] [1967] 3 W.L.R. 510 at p. 545. [82] *Ibid.* at p. 563.
[83] *Ibid.* at p. 558. But see *Peters* v. *Peters* [1967] 3 W.L.R. 1235, 1238; *Brown* v. *Brown* [1968] 2 W.L.R 969, 972; Dicey and Morris, *op. cit*, First Supplement.

nationality, thus, for example, leaving doubts as to the recognition position if, say, this decree had been granted to a German national, not habitually resident within the jurisdiction of the German court. One thing is certain, however. This German decree could not have been recognised before the House of Lords decision in *Indyka* and this would indicate that the views therein expressed on general wider bases of recognition are not going to be treated as mere *obiter dicta*.

V. THE AMBIT OF INDYKA

There is no doubt that this decision applies to the recognition rules for foreign divorces, but it is suggested, by Lord Wilberforce,[84] that his judgment, at least, is confined to recognition of decrees of dissolution of marriage. It is proposed to look, very briefly, at the extent to which the English conflict of laws has applied the *Travers* v. *Holley* principle of recognition, based on some concept of reciprocity or similarity, outside the sphere of foreign divorces and to consider the significance of Lord Wilberforce's suggestion that wider bases of recognition are, so far at least, confined to divorce.

(a) *Nullity decrees*

There are only a limited number of decisions on recognition of foreign nullity decrees but it has been suggested [85] that the principle of *Travers* v. *Holley* should there apply, and that English courts should recognise foreign decrees granted in circumstances similar to the exercise of domestic jurisdiction under section 40 (1) of the Matrimonial Causes Act 1965, or, perhaps, similar to any other domestic jurisdictional rule. There is no reason in principle why such recognition should not be allowed and in Australia [86] and New Zealand [87] wider rules of recognition have been introduced though on the strict rule that the exercise of foreign jurisdiction must have been on certain specific bases. What is to be seen, in England, is whether the extended recognition principle of *Indyka* may lead to recognition of foreign nullity decrees granted in jurisdictional circumstances where there is no English domestic nullity jurisdiction, *e.g.*, decrees granted by the courts of the nationality.[88]

(b) *Adoption*

The influence of *Travers* v. *Holley* is to be seen in the decision of the Court of Appeal in *Re Valentine's Settlement* [89] on the

[84] [1967] 3 W.L.R. 510 at p. 557.
[85] Report of the Royal Commission on Marriage and Divorce, para. 907; Dicey and Morris, p. 376; Cheshire, p. 325.
[86] Matrimonial Causes Act 1959, s. 95 (3) (*b*).
[87] Matrimonial Proceedings Act 1963, s. 82 (1) (*b*).
[88] *Cf.* the New Zealand Matrimonial Proceedings Act 1963, s. 82 (1) (*b*) (ii).
[89] [1965] Ch. 831; noted in (1965) 28 M.L.R. 470; and see *Re B.* (*S.*) (*An Infant*) [1967] 3 W.L.R. 1488.

recognition of foreign adoptions, for Lord Denning M.R. applied the *Travers* v. *Holley* principle to recognition of foreign adoption orders.[90] However, there was in that case a clear desire on the part of Salmon L.J.[91] to extend our recognition rules beyond reciprocity and recognise an adoption in a foreign country if it is effected by an order of the courts of that country, provided the same safeguards are applied as in England, even if the jurisdictional circumstances are different from those provided by English domestic law. The force of this argument was conceded by the two majority judges.[92] As Salmon L.J. propounded [93] the argument that there was far greater justification for recognising foreign divorce decrees in similar circumstances, it may be that, now the divorce recognition grounds have been expanded, so should those for adoption. If so, one sees the force behind Lord Wilberforce's view in *Indyka* that his remarks should be confined to divorce, for if recognition of foreign matrimonial decrees and orders is to extend beyond reciprocity, then there may well have to be developed separate grounds of recognition for each type of matrimonial cause or proceeding.

(c) *Decrees of presumption of death and dissolution of marriage* [94]

These would seem to fall within the *Travers* v. *Holley* reciprocity principle, on the authority of *Szemik* v. *Gryla*,[95] and there would seem to be a good case for recognition of such foreign decrees, closely connected with divorce, being based on principles similar to those for recognition of foreign divorces and thus for an extension of the recognition rules beyond similarity to the domestic jurisdictional grounds.[96]

(d) *Judicial separation* [97]

Though there is little authority on recognition of foreign decrees of judicial separation, such as there is points towards recognition of foreign decrees granted in circumstances where an English court would have assumed jurisdiction. Hence a foreign decree of the court of the common domicile will be recognised in England,[98] an English court having jurisdiction in such circumstances.[99] However, a foreign decree granted by the court of the petitioner's residence will not be recognised,[1] as an English court has no jurisdiction based on the residence of the petitioner,[2] though it does have jurisdiction based on the residence of the respondent.[3] So far the

[90] *Ibid.* at p. 842.
[91] *Ibid.* at pp. 851–854; *cf. Lee* v. *Lee* (1965) *Judgments of the Royal Court of Jersey* 505, especially at p. 510; noted in (1967) 84 S.A.L.J. 461.
[92] *Ibid.* at p. 848, *per* Lord Denning M.R. at p. 846, *per* Danckwerts L.J.
[93] *Ibid.* at p. 851; *cf.* (1967) 84 S.A.L.J. 461 at p. 463, n. 8.
[94] Dicey and Morris, p. 338; Webb (1966) 2 N.Z.U.L.R. 145 at p. 158.
[95] 109 S.J. 175; [1965] C.L.Y. 588.
[96] Under the Matrimonial Causes Act 1965, s. 14.
[97] Dicey and Morris, p. 337.
[98] *Tursi* v. *Tursi* [1958] P. 54.
[99] *Eustace* v. *Eustace* [1924] P. 48.
[1] *Hughes* v. *Hughes* [1958] C.L.Y. 502
[2] *Graham* v. *Graham* [1928] P. 81; *cf. Riera* v. *Riera* (1914) 112 L.T. 223.
[3] *Armytage* v. *Armytage* [1898] P. 178; *Sim* v. *Sim* [1944] P. 87.

few recognition decisions accord with the reciprocity principle of *Travers* v. *Holley*, which was specifically applied in the briefly reported decision in *Hughes* v. *Hughes* [4] and which is supported by academic opinion [5] as being the basis of recognition of foreign decrees of judicial separation.

Will the courts feel free after *Indyka* to recognise foreign decrees granted in circumstances and on bases not giving jurisdiction to an English court? Certainly judicial separation does provide a recent example of problems which may arise from a recognition rule being based on reciprocity in the event of the domestic jurisdiction rule being narrowed. The Court of Appeal in *Sinclair* v. *Sinclair* [6] has decided that, despite previous authority [7] and academic opinion [8] suggesting the contrary, an English court does not have jurisdiction to entertain a suit for judicial separation or restitution of conjugal rights on the basis that the parties had their matrimonial home in England when the events occurred on which the claim is based. Although in this case Willmer L.J. considered that *Indyka* was of no help, being a decision on rules of recognition, an application of its approach might permit an English court to recognise a *foreign* decree of judicial separation granted by the court of the matrimonial home, despite the recent narrowing of the English domestic jurisdiction.

A further issue as to the ambit of *Indyka* is as to its effect on English domestic jurisdictional rules. There was a general basic distinction drawn in the House of Lords between rules of domestic jurisdiction which are either the creation of the legislature or have been approved by Parliament [9] and recognition rules which, with a few minor statutory exceptions, are judge-made.[10] The result of this distinction was a conclusion by their Lordships that they could and should do little to curtail the domestic jurisdictional rules, for they were unable to alter Acts of Parliament. Though they could extend the bases of domestic jurisdiction it was generally felt that any alteration of domestic rules should now be left to Parliament, bearing in mind that their Lordships might well suggest matters to be considered in the amendment of such rules,[11] and they had little hesitation in pointing to defects in the present domestic rules.[12]

Indyka is thus a decision on recognition and is to be considered as no authority on domestic jurisdictional rules [13]; but it will be

[4] [1958] C.L.Y. 502.
[5] Cheshire, pp. 854–855.
[6] [1967] 3 W.L.R. 1540; reversing Ormrod J.: [1967] 2 W.L.R. 1487, only as to the meaning of "residence." See Webb (1967) 30 M.L.R. 573.
[7] *Ward* v. *Ward* (1923) 39 T.L.R. 440; *Milligan* v. *Milligan* [1941] P. 78.
[8] Dicey and Morris, pp. 334, 336.
[9] [1967] 3 W.L.R. 510 at p. 559, *per* Lord Wilberforce.
[10] *e.g.*, *ibid.* at p. 541, *per* Lord Pearce, at p. 561, *per* Lord Pearson; *cf.* Mann (1967) 30 M.L.R. 94 at p. 96; Kahn-Freund, *The Growth of Internationalism in English Private International Law*, pp. 30–31.
[11] *Ibid.* at p. 524, *per* Lord Reid.
[12] *e.g.*, *ibid.* at pp. 519, 524, *per* Lord Reid, at pp. 552–556, *per* Lord Wilberforce.
[13] See *Sinclair* v. *Sinclair*, *supra*.

interesting to see what influence the reliance on connecting factors such as nationality or residence has on the use of such factors as bases of domestic jurisdiction. This is of some importance as the two factors mentioned were considered relevant to domestic jurisdiction in the Draft Code of the Royal Commission on Marriage and Divorce.[14]

CONCLUSIONS

It is stated in *Indyka* that a broadening of the recognition rules beyond the principle of *Travers* v. *Holley* is desirable [15] and would reduce the number of " limping marriages " whilst not involving the real likelihood of injustice to people who have relied on the present law as to their matrimonial status.[16] The first part of this argument is basically true but one has to be a little more guarded as to a denial of danger of injustice. Any approval of the *Travers* v. *Holley* principle on the facts of this case is likely to cause difficulty and uncertainty.[17] Secondly, *Travers* v. *Holley* did have a merit of certainty, albeit rather mechanical, symmetrical certainty. At the moment, because of the diffused and complex nature of the judgments in *Indyka*, a great deal of uncertainty has been cast into the law simply because it has not been made clear in what circumstances a foreign decree of divorce will be recognised and because doubt has been cast upon established rules of the conflict of laws without any definitive statement as to the new revised position. There may well be a sharp increase in the number of petitions for declaratory relief, under R.S.C. Ord. 15, r. 16. Especially will there be difficulty and uncertainty if any support is given to the suggestion that the new rules of recognition may in some circumstances be narrower than the principle of *Travers* v. *Holley*, on which so many people must have relied.

The dangers of uncertainty were minimised by Lord Wilberforce when he said [18] that " the courts are well able to perform the task of examining the reality of the connection between the resident petitioner wife and the jurisdiction invoked, bearing in mind, but not being rigidly bound by, the developments of domestic jurisdiction." There may be little doubt that the courts *can* resolve the problem of the petitioner's status with reasonable ease, but, with respect, therein lies the problem, for in the present state of the law there is a likelihood that *only a court* can determine this and many people would like to be able to marry or otherwise alter their status without having to petition a court to determine whether they can do so, and, if so, how.[19]

P. M. NORTH.*

[14] See Draft Code, Part I—Jurisdiction of the Court.
[15] [1967] 3 W.L.R. 510 at p. 542, *per* Lord Pearce.
[16] *Ibid.* at p. 527, *per* Lord Reid.
[17] See Part IV, *supra*.
[18] [1967] 3 W.L.R. 510 at p. 559.
[19] I am grateful to Professor Otto Kahn-Freund, Professor of Comparative Law in the University of Oxford, for a number of helpful comments. The remaining errors are all my own work.

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THE COMMONWEALTH IN AFRICA *

Introductory

Within the last ten years, there have come into existence thirty-eight independent states in Africa. Of these, eleven are English-speaking, that is, they were former dependencies [1] of Great Britain. At independence, each of these countries freely opted to remain within the Commonwealth, and has remained so till today. It is well known that the grant of political independence to a former dependency of Britain is a matter exclusively for the British Government of the day to decide, but that membership of the Commonwealth is a matter for all its members to determine. This distinction was brought to the fore when Ghana, the first African territory to be granted independence by Britain, applied in the usual way through the British Secretary of State for Commonwealth Relations for membership of the club. It was feared in some quarters that the Union of South Africa, as she was then called, might, for reasons of race, oppose Ghana's membership after Great Britain had granted independence. Fortunately, the problem was resolved and Ghana was admitted at least without a public airing of views among the existing members.

Beginning with Ghana, a fairly common pattern of evolution is discernible among the African members of the Commonwealth. This has taken the form of nearly all of them first becoming a Dominion in the classical sense of the Balfour Declaration of 1926, with the Queen as the Head of State. Following the examples of India, Pakistan and Ceylon, an Independence Act is passed by the British Parliament by which the newly independent territory received legal recognition as a sovereign state; this is in addition to an Order in Council which sets out the detailed provisions of the constitution.[2] Such a monarchy soon gives way to a republic which seems, however, determined to remain within the Commonwealth.

Hence Ghana attained independence on March 6, 1957, and became a republic on July 1, 1960; Nigeria, which became independent on October 1, 1960, became a republic on October 1, 1963; Tanganyika became a republic in December 1962, after a little over eighteen months as a monarchy [3]; other countries that have

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[1] Ghana, Nigeria, Sierra Leone, Tanzania, Kenya, Uganda, Malawi, Gambia, Zambia, Botswana and Lesotho.

[2] See, *e.g.*, the Uganda Independence Act 1962 and the Uganda (Independence) Order in Council 1962; also the Kenya Independence Act 1963, and the Kenya Order in Council 1963.

[3] Tanganyika Republic Act 1962 came into force on December 9, 1962.

followed suit are Kenya,[4] Uganda and, recently, Malawi[5]; there are rumblings that Sierra Leone and even Gambia[6] may soon join the republics within the Commonwealth; no such thought has so far assailed the leaders of the newest member, Lesotho. The only notable exception to this pattern is Zambia, which went straight from a dependent to a republican status at independence, without the intervening period of monarchical rule.[7] So wide is the discretion allowed by Britain to each newly independent country to determine its own destiny.[8] Two reasons may be given for the vogue among the newly independent members of the Commonwealth in Africa for turning their monarchies into republics within a few years of independence. The first is that, since India broke the ice in 1949 by getting the then British Government to evolve a formula which makes it possible for a member of the Commonwealth to become a republic which does not owe any allegiance to the Queen of England while accepting her as the Head of the Commonwealth, the newly independent states in Africa are encouraged to follow this precedent. The second reason is that the emotions of nationalism which the grant of independence generates tend to accentuate the problems of the dyarchy. The Governor-General, whether British or African, is seen, not in his proper role as the legal representative of the Queen, but as a symbol of imperial power. Also, their French-speaking colleagues, both in the Organisation of African Unity and at the United Nations Organisation, have always tended to confuse the Commonwealth idea with the French Community, while a number of Eastern European countries and others have until recently insisted that membership of the Commonwealth is inconsistent with complete independence and sovereignty, especially of the African and Asian countries. The newly independent African states for these and other reasons have for the most part preferred republics to monarchies. They have, however, avoided the temptation to leave the Commonwealth, because they fully appreciate the economic advantages of belonging to the sterling area and the periodic opportunities of meeting other Commonwealth Heads of State and Government.

In constitutional terms, this has nevertheless resulted in a widespread invocation of the doctrine of autochthony in the newly independent African states. It is considered inappropriate that the

[4] Kenya Republic Act 1965 gave effect to Kenya becoming a republic within the Commonwealth as from December 12, 1964.

[5] Before this, the Malawi Independence Act 1964 provided that the territories comprised in the Nyasaland Protectorate should form the Dominion of Malawi from July 6, 1964.

[6] See Gambia Independence Act 1964, which granted Gambia fully responsible status within the Commonwealth.

[7] The Zambia Independence Act 1964 established the Republic of Zambia, with effect from October 24, 1964, as an independent republic within the Commonwealth.

[8] The Irish Republic, Burma and the Sudan are examples of former dependencies who freely chose to opt out of the membership of the club at independence.

constitution of a self-governing state should derive its authority from an external source, namely, an Order in Council of the Queen of England and an Act of the British Parliament. In so far as this amounts to a derogation from the sovereignty of the new state, there is a strong urge to substitute for it a home-grown constitution which should derive its authority from the people. The result has often been a constitution expressed to be based upon the sovereign will of the indigenous people. The legal issue involved is an intractable one. An example of what happened in the case of Nigeria may help to illustrate the point. The Order in Council of 1960 gave Parliament the power to alter any of the provisions of the Order or of the Constitution, provided the Governor of each Region " has signified consent to its having effect." [9] The problem that then arose was how to overcome the further requirement that, in order for a proposed enactment to become law, the Governor-General's assent must be obtained " on behalf of Her Majesty." [10] When the constitution had been duly passed in both Houses of Parliament, the Nigerian Governor-General, who was deemed under section 157 (1) to be elected President of the Republic on the date of the commencement of the new constitution, was duly sworn in as such and soon thereafter signified his assent to the constitution as required under section 62 (1). The Regional Governors all without exception signified their consent to its having effect. In this way, the country was saved the embarrassment that must inevitably result from her Governor-General having to assent " on behalf of Her Majesty "; instead, the necessary assent was given by the President as President of the Republic of Nigeria in his own right. If the constitution had had to be assented to on behalf of Her Majesty, then it would still have owed its authority to an external source.

Unlike India and Pakistan,[11] Nigeria did not expressly claim to be holding a Constituent Assembly in passing the new republican constitution of 1963 into law. The form and structure of the constitution had been settled at an All Nigeria Constitutional Conference a few months before Parliament did its work. To drive home the principle of autochthony, the preamble to the Constitution, after expressing the resolve of the people to establish the Federal Republic of Nigeria, their desire to ensure their unity and faith in their fatherland, promotion of inter-African co-operation, internal and world peace based upon liberty, equality and justice, ends with these words:

> " We the people of Nigeria by our representatives
> here in Parliament assembled, do
> Hereby declare, enact and give to ourselves the
> following Constitution."

[9] s. 18 of the Order in Council. [10] s. 57 (1) of the Constitution.
[11] As to which, see K. C. Wheare: Constitutional Structure of the Commonwealth (1963).

Similar declarations occur in the Constitutions of India and Pakistan, and the Constitutions of Ghana, Tanzania and Zambia contain sentiments to the same effect. Indeed, the path followed by nearly all the newly independent states in Africa, like the legal issues involved, has been similar. Whether the desire for constitutional autochthony has been achieved with impeccable legal validity will continue to be the subject of academic controversy for some time to come.

CHARACTERISTICS OF THE AFRICAN CONSTITUTIONS

In spite of the divergences of historical developments and of cultural patterns among the eleven members of the Commonwealth in Africa, certain common features are noticeable. The most important of these are the Westminster-type parliamentary institutions like a Cabinet system of government which implies responsibility of the executive to the legislature, a judicial system which assumes the independence of the judiciary, a non-political civil service, an efficient police force, and if one may say so without giving offence, a loyal, well organised and disciplined army. Other notable characteristics of at least the majority of these constitutions are the provisions concerning fundamental rights, a common citizenship, and an electoral system upon which any form of parliamentary democracy must be based. To say this is not to suggest that the Westminister model has been as closely observed in the spirit as in the letter whenever it has been adopted in these new constitutions. A brief survey will indicate the trend.

The most crucial issue facing a newly independent African country is what to do with the problem of power; or, if we like, the problem of transfer of power. In every instance, it will be found that, as British power was about to be withdrawn, various latent forces have come to the fore. The impartial referee is about to depart, and both sides to the game, or at least sections of them, are unsure about the future. No doubt the colonial régime has been a strong government in certain ways, but it has also engendered a feeling of fair and impartial administration of justice and a sense of order and peace among the several communities under its sway. There is here a problem of dyarchy in a local connotation—the dichotomy between the modern *central government* and the traditional *local administration*, the one headed by the new charismatic leader, the other by the traditional rulers of the several communities throughout the country. The struggle is very often between loyalty to the new political leader and allegiance to the indigenous source of political and cultural power—the chiefs —wherever they have evolved to that level. One suspects that the arrangements arrived at frequently give the impression of an uneasy truce between the British imported legislative council system and the indirect rule system. The trend has been for the former gradually to absorb the latter in order to have a homogenous

parliamentary structure which would be capable of taking the strains of independence. If one may adapt the expressive phrase of Lord Lugard, the new nationalist leaders of the African states may be regarded as coming to power by a process of an unconscious succession to the Dual Mandate.

This problem may be illustrated by mentioning the recent antinomy between the Central Government of Uganda and the traditional administration of Buganda, or that between King Moshoeshoe of Lesotho and his Prime Minister. In its slightly older form, the problem was tackled in Ghana by the setting up of Regional Assemblies with purely advisory, and some would say, ineffective roles *vis-à-vis* the Government, while in Nigeria until the recent trouble there, compromise was sought in Regional Houses of Chiefs and the Central Senate (though the chiefly representation was quite small in this body) with powers modelled on those of the House of Lords in the (British) Parliament Acts of 1911 and 1949. Sometimes, the struggle has been between colony and protectorate, that is, between modernists and traditionalists.[13]

Thus, in *Buck* v. *Attorney-General*,[13] six sophisticated Creoles of Freetown, who were the descendants of the original settlers, claimed the ownership of the Colony which together with the protectorate constitutes the independent State of Sierra Leone within the Commonwealth. The claimants sought a declaration that the establishment of the new state was void, that they were entitled to set up their own government over the Colony and that the Crown held the land there in trust for them. The Court of Appeal held that the State of Sierra Leone [14] was validly established by the Sierra Leone Independence Act 1961, that the claimants as successors to the settlers of the Colony had no interest in or rights over the land of the Colony and that in any case the English courts have no jurisdiction to make a declaration impugning the validity of the constitution of a foreign independent state, at any rate where it is clear that that is the object of the action brought. Another instance occurred in *Sabally and N'Jie* v. *Attorney-General*.[15] There, an unsuccessful candidate at an election sued for a declaration that the Gambia Validation Order in Council 1968 was invalid. By that Order, Her Majesty in Council validated retrospectively certain elections in the Gambia which were invalid because they did not comply with the constitution granted in 1961. The result was

[13] Since this lecture was delivered, the Army in Sierra Leone has taken over the Government, and it has become clear that ethnic differences played a part in the changes.

[13] [1965] Ch. 745; [1965] 2 W.L.R. 1088; [1965] 1 All E.R. 882. Petition for leave to appeal to the House of Lords was dismissed.

[14] Under s. 2 of the British Settlement Act 1887, the Crown has power to establish by means of an Order in Council laws and institutions for peace, order and good government in a British settlement, even though they are also to apply to a neighbouring protectorate.

[15] [1964] 3 W.L.R. 782; [1964] 3 All E.R. 877.

that the new constitution could not operate. The Judicial Committee held that the 1968 Order was *intra vires* and valid, but on two alternative grounds: (a) that it was a mere legislation under the power reserved to the Crown in that behalf by section 74 of the new constitution (*per* Harman and Russell L.JJ.), or (b) that it was authorised by the British Settlement Act under which the constitution had been granted, since that Act extinguished the prerogative right to grant representative legislatures to settled colonies and since all acts done thereafter in relation to a British settlement by the Crown in Council were done under the powers contained in that Act (*per* Lord Denning M.R.).[16] In this way was resolved another attempt to nullify an independence constitution by a colony-dominated élite in their struggle for power against a largely protectorate group. The constitutional often tends to obscure the sociological basis of the struggle.

Another aspect of the same phenomenon is the fear of domination by one group over others. This has resulted in two forms of constitutional developments. In Nigeria, for example, it has led to the demand by the Nigerian leaders for a federal form of government at independence, the thought being that the federal structure would permit the various ethnic groups to develop as far as possible along their own lines, while being associated together for common economic and social advantages resulting from membership of a large political entity. In Ghana, the same demand was made by the opposition party as a condition of agreeing with the majority party to the grant of independence to the then Gold Coast in March 1957. As this demand was vigorously opposed by the government party, a compromise was arrived at, whereby Regional Houses of Assembly were to be established to give expression to the aspirations of certain ethnic groups and minority elements, especially in Ashanti and the Northern Territories. The result was a unitary constitution, with the whittling away of many of the powers given to these regional bodies soon after the grant of independence. The government party claimed that a federal form of government, at least in the context of Ghana, would encourage ethnocentric prejudices and thereby militate against rapid unification of the diverse elements making up the country. In Kenya, a similar development towards regionalism featured the independence constitution, in spite of the opposition to it of the government party.[17] The Regional Assemblies were half-way houses between the autonomous Regions of Nigeria and the Ghana Regional Assemblies, at least until the recent merger of the opposition party with the government party and the consequent

[16] Both Lord Denning M.R. and Russell L.J. said further that, even if the constitution had been granted under the prerogative, the Queen in Council could still rescue it from such an *impasse*.

[17] The Kenya Order in Council (No. 791) 1963, which came into operation on April 9, 1963.

diminution in the authority and functions of the Kenya Regional Assemblies.

One other feature of the demand for some form of decentralisation of authority is inequality in the economic resources of different parts of the same territory. It finds its most obvious expression in the demand for a system of revenue allocation as between the centre and the constituent units of a federation. Nigeria illustrates this kind of trend in English-speaking Africa. But the interplay of economic considerations and nationalist particularism can be seen as underlying the break-up of the British Central African Federation [18] as well as the somewhat retarded evolution of an East African Federation.

In nearly all the newly independent states, with the exception of Ghana, Tanzania and Zambia, a major demand for means to be devised for allaying the fears of minority groups and individuals after the grant of independence by Britain has been that certain fundamental rights be written into the independence constitution. It is the United Nations Universal Declaration of Human Rights of 1948 that supplied the inspiration as well as the model. It is now usually admitted that the Nigerian Constitution contains the most comprehensive set of provisions on fundamental rights and freedoms in modern times, and that these have served as a precedent for all the other countries in Africa and elsewhere which have since embodied similar provisions in their constitutions. It may be mentioned in passing that these fundamental rights provisions are to be found in entrenched clauses, so as to ensure that they are not wantonly done away with by the legislatures. In addition, machinery is provided for their enforcement by means of the writs of habeas corpus, mandamus, prohibition and certiorari; injunctions and declaratory judgments are also available to those who allege an infringement of any of these rights. What is lacking in most African territories in this regard is the introduction of a system of legal aid, so that those who have genuine grievances in these areas may be enabled to obtain redress at law.

It is to be noted that the idea of individual freedom under the law was, at independence, already well established as part and parcel of the legal system inherited from Britain by the several African states. They are what in British constitutional law are usually referred to as the personal liberty of the subject, freedom of property, freedom of speech, of assembly and of association. What is new has been the greatly expanded list and details of these freedoms in a codified form within the new constitutions. In the African context, especially about the date of independence, their specific entrenchment has a psychological value particularly for the ordinary inhabitants of each of the new states. It is regarded as a charter of liberties no less significant for them than the great

[18] The dissolution was effected by means of an Order in Council under the Rhodesia and Nyasaland Act 1963.

Magna Carta of 1215 must have been to the Barons at Runnymede. It provides at least a yardstick by which to measure many of the possible misdeeds of the new rulers in the post-independence period. As such, their inclusion in the constitution of a newly independent state should be welcome to those who set any store by civilised values and social justice for all. It is, therefore, a matter for regret that in the Republican Constitution of Ghana of 1960, the controversial Article 18 merely proclaims a series of rights and freedoms which the President must swear to uphold at his installation. It is little wonder therefore, when, as the result of the test case of *Re Akoto* (1962) brought against the application of the Preventive Detention Act to a plaintiff, the Supreme Court of Ghana found itself obliged to hold that all the rights and freedoms mentioned in section 18 have no more force than the Queen's Coronation Oath. When Tanzania was about to introduce its independence constitution, she followed Ghana's example in refusing to entrench fundamental rights provisions therein, though she did not include (as did Ghana) any other proclamation of good intentions; her Constitution simply remains silent in regard to fundamental rights, apparently on the assumption that the English common law on the subject is sufficient.

The new states of Africa, while ostensibly following the Westminster model, have evolved constitutional patterns and forms that deviate from that model in varying degrees. Before we consider, however, the issue of obvious deviations from the British norm, we may mention the warning implicit in the Privy Council's ruling in *Adegbenro* v. *Akintola* [19] that where it is desired to incorporate a British rule or convention in the constitution of a Commonwealth country, this must be done expressly. In the instant case, section 88 (10) of the Constitution of Western Nigeria provided that the Governor should not dismiss the Regional Premier " unless it appears to him " that the Premier had lost the support of a majority of the members of the House of Assembly. In purported exercise of this power, the Governor dismissed the Premier on the strength of a letter signed by sixty-six out of 124 members of the House stating that they no longer supported the Premier. It was held by the High Court of the Region that the Governor could not dismiss the Premier except on the basis of an adverse vote against him taken on the floor of the House. This decision was upheld on appeal by the Supreme Court of Nigeria by a majority of four to one, but the Privy Council reversed that decision. Their lordships held (1) that the Constitution of Western Nigeria was a written one, the wording of which could not be overridden by the extraneous principles of other constitutions which were not explicitly incorporated into it, and (2) *a fortiori* the British constitutional convention relating to the sovereign's right

[19] [1968] A.C. 614; [1968] 3 W.L.R. 63.

to dismiss the Premier could be of no guidance, since this was no longer considered to be within the scope of practical politics in Britain. This ruling was not well received in Nigeria, where it had hitherto been assumed that conventions of the British constitution, to the extent to which these had not been expressly excluded from the Nigerian Constitution Order in Council of 1960, could be invoked in construing provisions relating to the Cabinet system of government. The result was an amendment to the constitution taking away the power of the Regional Governor and, subsequently that of the Head of State, to dismiss a Premier (or the Prime Minister, as the case may be) except on the basis of an adverse vote to that effect taken on the floor of the House concerned.[20]

Let us now go on to consider in some detail instances of express departures from the Westminister model. Ghana, for example, has until the recent trouble there, evolved an executive which is an unhappy mixture of the American and the French executive presidency, while still maintaining, at least in form if not in substance, the British Cabinet system under which Minsters are still Members of Parliament. What is new in this mixture is not so much the incongruous elements of which it is made as the super-added doctrine of the supremacy of the party. It seems clear that the principle of ministerial responsibility to Parliament is seriously eroded by the higher allegiance which the Ministers are called upon to bear towards the party which no doubt must become the ultimate source of all laws supposedly enacted by the legislature.

The executive structure of the Republic of Tanzania, like that of Uganda before the recent changes there, would appear to defy precise analysis in constitutional terms. Tanzania is no doubt a republic, but it is also federal in that it consists of the former Republic of Tanganyika and that of Zanzibar. The former Head of the State of Zanzibar is the first Vice-President of the two federated states. What is not quite clear is the exact legislative competence of the central legislature in Dar-es-Salaam and of the government on the island. On some occasions in the recent past, instances have occurred of a display of legislative omnipotence on the part of the Zanzibar Government. In the case of Uganda, until recently another federal state of a kind, the executive relationship between the Lukiko of Buganda and the Central Legislature,[21] and even more so the legal position of the Kabaka as the Head of the Republic, was never precisely defined. Equally enigmatic, until the recent constitutional change, was the position of the other three former provinces of Uganda *vis-à-vis* Buganda on the one hand, and the

[20] An interesting side-light to this exercise was the argument in the legislatures that the retroactive operation given to the constitutional amendment could be justified in the precedent afforded by the British Government in respect of Gambia only a few weeks previously.

[21] The Uganda (Constitution) Order in Council 1962.

centre, on the other.[22] In Kenya, as we have noted, the quasi-federal structure established at independence would appear to have been gradually coalescing into a unitary one, in consequence of the gradual emasculation of the already limited powers and functions assigned to the Regional Assemblies at independence. It is interesting to observe the executive position of the President in regard to the legislature. As Head of Government, the President is required by the Constitution to have a constituency like any other member of the Lower House and to take his place like any other Minister in answering questions and otherwise giving an account to the members in respect of matter within his portfolio; as Head of State, he has the prerogative to occupy the presidential chair facing the House whenever he has to address it on any major issue of policy and, if he desires to take part in the ensuing debate, he must leave his presidential chair and resume his place on the Ministers' benches. The system seems to have worked well in practice.

African states which have tended, on the whole, to conform to the Westminster model of the Head of State occupying the status of a constitutional monarch, while the Head of Government who is president of the Cabinet which is responsible to the legislature is a different officiant, are Nigeria until her recent trouble, Sierra Leone and Gambia. Even in these territories, however, there are not wanting many who prefer the pattern of an executive president who is both Head of State and Head of Government. It is not obvious that the concentration of powers of an absolute character which this implies is conducive to the flowering of parliamentary democracy as we understand it. The risk of a slide into dictatorship is clearly increased by the enthronement of an all-powerful executive Head of State.[23]

It has been argued by the protagonists of this aspect of government in Africa that an all-powerful executive head would be more likely to eliminate ethnic particularisms and foster a sense of nationhood among the diverse elements of the population. Examples often cited are those of Metternich of Austria and Garibaldi of Italy who in their respective masterful ways went each far along the road of welding together the divergent groups—ethnic, religious and economic—into one nation. While there is some truth in the assertion that most of the newly independent countries of Africa have yet to achieve a sense of even the beginnings of nationhood, it is at least doubtful whether the royal road to nation-building lies along the path of coercion and tyranny.

Another notable departure from the Westminster model has

[22] The *détente* between Buganda and the Central Government is well known; *e.g.*, in *Kabaka's Government and Anor.* v. *Attorney-General (Uganda) and Anor.* [1965] 3 W.L.R. 512, Uganda unsuccessfully challenged the validity of a referendum held to determine to which federal State of Uganda "the lost counties" should belong.

[23] See S. A. de Smith: *The New Commonwealth and its Constitutions*, pp. 230–240, for a useful analysis of the problem.

been the emergence of one-party states in Commonwealth Africa. This constitutional phenomenon occurs more often in the case of countries with presidential executives than in those with constitutional Heads of State. This is probably because the same political imperative that dictates the vesting of the Head of State with executive powers so that he could more effectively weld the various ethnic groups into one nation at the earliest possible moment, seems to be at work in also seeking to enforce conformity among the various political persuasions. Ghana was, until her recent change of government, a one-party state *par excellence*; Tanzania has been following closely in the footsteps of Ghana, though with certain modifications which still permit a limited field of choice of candidates for the legislature; Zambia, which set out as a two-party state at independence, would appear to be on the verge of becoming a one-party state; Malawi no longer has an official opposition; Uganda defies precise analysis as much in her constitution-making as in her political party system, and it is not easy to say whether she still brooks an opposition party in Parliament; the Gambia and Kenya have each retained an opposition party in some form or other; whilst Nigeria, until her change of government in January 1966, boasted a small opposition party in Parliament, and opposition parties of some sort in each of the Regional legislatures; the picture in Botswana and Lesotho is still not clear, as the in-fighting goes on between the traditionalists and the modernists.

The protagonists of the one-party state say that the two-party system does not work well in the conditions of post-independence African societies. An opposition party paid by the government of the day to keep the party in power on its toes is a luxury which the new African states could not afford since, according to the supporters of the system, a parliamentary system of government on the British model would be more likely to foster fissiparous tendencies in the poly-ethnic societies of modern Africa. The task of economic and social reconstruction demands for its fulfilment that all hands should be on deck. Some degree of regimentation is indispensable to rapid economic and technical progress, while too much concern with individual freedom and the ideals of democracy inhibits it, especially in the conditions of developing societies in Africa. The intellectuals even suggest that the impressive economic recovery of France under Charles de Gaulle would have been impossible without some degree of strong government; and they go further to contrast the French approach with that of Great Britain, with its concern for economic advance based upon a proper regard for individual freedom and the consequently slower pace of economic recovery. To this analogy one might say that the real choice is between the Communist Chinese approach to economic and technical advance and that of India, within the last decade.

If the advocates of the one-party state had rested their case there, one might have excused the argument without necessarily

accepting the logic of it. But when it is sought to justify the one-party system on the ground that indigenous African political organisation knew no opposition party, one is bound to demur strongly. Merely because indigenous societies did not feel the need to arrange its system of government on the basis of a party in power and a party in opposition, it does not follow that a modern system of government with all its complications of different economic, technical, scientific and cultural patterns in the world of today should be run by rules of practice evolved for a different political milieu. Besides, traditional systems of government contain their own built-in arrangements for the expression as well as the resolution of conflicts within the competing groups in society. There were systems of checks and balances designed to keep the ruler on the path of rectitude and to punish him for transgressions against the established code of behaviour. The so-called secret societies were probably devised to perform this role. They were like permanent opposition groups that were part and parcel of the body politic and they were recognised as such by both the ruler and the ruled. Even in the African societies without such powerful bodies, there were always semi-autonomous corrective groups charged with the duty of being, like the Irish, "always agin' the Government." It is only on this hypothesis that one must account for the long history of destoolment of recalcitrant kings and chiefs in African societies. In societies without traditional chiefs, the republic or series of republics would be maintained by the activist groups within the mutually balancing segments. It is submitted that a note of dissent has always been present in indigenous African systems of government, although the mode of organising and expressing it might often differ from those to which we are accustomed today. The one-party system must not, therefore, be derived from any indigenous African idea of government. The one-party system is not the answer to the difficult problems of nation-building and economic progress. There is always the danger that, even if it be adopted as a temporary measure until a country has achieved the necessary social equilibrium, those in power might want to perpetuate their rule since it would be difficult to know when that happy state has been reached. An oligarchy might have been enthroned which would make it difficult, if not impossible, for any change of government to take place by peaceful means.

It has recently been suggested in Arthur Lewis's monograph "Politics in West Africa" that a coalition government composed of all the major political parties within a territory would be preferable in the foreseeable future. While there is much truth in the assumption that one of the major sources of conflict in the newly independent States has been that certain of the political leaders would not like to be left out of the government of the day, a coalition government would not appear to be an ideal solution to the problem of political stability in Africa. The Nigerian experience

furnishes an example of an experiment of this kind between 1960 and 1964 when two major parties formed an uneasy coalition government and again during 1965 when a third political party joined the coalition. It did not work very well, partly because differences in temperament and in political beliefs were always straining the team spirit that is requisite to the British Cabinet system of government on which Nigeria had modelled her own. It is doubtful whether over-weening ambition and undue self-assertion, on the part both of individuals and of ethnic groups of Africa, might not continually rock the boat of a coalition government. There is little wonder, therefore, that the British have never been enamoured of coalition governments, except in times of war or grave national emergency. A coalition government would succeed in Africa as a permanent system only if it could be assumed that the newly independent states are in a perpetual state of emergency.

There is as yet too much impatience with the slow but sure operations of democracy. There is as yet not much evidence of a readiness to cultivate the democratic temper. The struggle for power that follows in the wake of independence often takes an invidious form. Those who win independence elections are looked upon as inheritors of imperial power and glory. The unsuccessful ones are usually bad losers. They cannot wait for the next election.

THE ROLE OF THE CIVIL SERVICE, THE POLICE AND THE MILITARY

Let us now turn to a brief consideration of certain other features of government which the newly independent African states have inherited from British rule. If, in the executive and the legislative fields, we have seen that the British forms have in the majority of cases been retained, in other spheres the legacies have been even more specific and substantial. In this regard, the civil service deserves attention. At the approach of independence, some of these territories pursued a conscious policy of Africanisation of their respective local public services to the point that arrangements were entered into with Great Britain on behalf of the expatriate civil servants whereby a system of compensation for loss of career was evolved for those who might wish to retire prematurely. The necessity for this was that most of the senior administrative and technical posts were until the advent of self-government held by British officers who had been recruited in the United Kingdom into the Colonial Civil Service which supplied the necessary personnel for the various dependencies. The Colonial Civil Service was interchangeable, and this enabled the officers to enjoy a certain degree of mobility and to impart to the various territories in which they had occasion to serve some of the best traditions of the British Civil Service—a good deal of political neutrality, an incorruptible public service and an efficient administration.

Some territories were more fortunate than others in their inheritance. While countries like Nigeria, Ghana and Sierra Leone had had almost a century of this tradition, together with the opportunity to participate at all levels of administration except those at the very top, others in East and Central Africa had been less fortunate, largely because of the problems incident to European settlement and the somewhat later start the people had had of participation in the administration of the country. The former group of territories had, at the time of independence, produced a fairly large number of highly qualified personnel so that the process of succession by Africans to Britons was relatively smooth; but even these were wise to have retained a small number of professionally qualified British officers in some technical departments of the government. In addition to the steady output of graduates from overseas and local universities, training institutions like the Institute of Public Administration at Zaria were quickly established in almost all the territories in order to provide the middle range of the civil service with trained personnel. In the case of the East and Central African countries, the character of the civil service has been changing rapidly since independence and the pace of Africanisation has been fast, no doubt because larger gaps than those existing on the West Coast have had to be filled in the local civil service even at the lower levels; Europeans and Asians who had between them controlled the civil service until independence have been made to give way to Africans in a steady exodus. These countries have themselves established training centres similar to those on the West Coast, in addition to the increasing flow of university-trained men and women from overseas and local universities and other institutions of higher learning. Africa is a continent in a hurry, and this is more so in the sphere of public administration than in any other field.

It would, therefore, be true to say, with Mr. A. L. Adu in his *The Civil Service in New African States* that, even in the case of West Africa which has had a longer experience of indigenous participation in civil administration, the right traditions for an effective, non-political and incorruptible civil service have yet to be evolved to suit the peculiar circumstances of the several Commonwealth members in Africa. To achieve these worthwhile ideals the civil service must be brought to terms with the political leaders of the new states, and vice versa. Looking at the scene across the continent one suspects certain disquieting trends: there would seem to be growing contempt on the part of the civil servants, especially in the higher echelons, for the political bosses because of their own often better standards of educational attainments and their suspicion of certain of the politicians' activities. One sometimes hears from this group allegations of corruption against politicians especially in the matter of the award of contracts for certain essential public services. The politicians, for their part, often show obvious

impatience of bureaucracy and suspicion of the, to them, clever heads of ministries and departments. The politicians are sometimes heard to say that the civil servants' contempt for them has been inherited in large part from their British predecessors who often tended to look upon politicians as dishonest brokers, in a process that ultimately led to their departure. Partly for reasons of personal prestige and partly because of political considerations, many of the Ministers of State tend to distrust the civil service élite and to strike out on an independent path of their own. It must be said that certain of the senior civil servants sometimes show up their political bosses, especially if they are better educated than the latter.

It seems that mutual suspicion and distrust between the political leaders and the civil servants would only be gradually removed as the quality of leadership on both sides improves with the years and as both sides learn more to respect one another and to appreciate that each side is indispensable to the other in the task of an efficient and incorruptible public administration of their territories. The civil servants, have, by their training and the force of example, more to contribute because on them really depends the smooth working of the machinery of government. Politicians may come and go, but the civil servants remain, or should remain, where the British parliamentary system has been adopted in a given territory.

It is because an ideal civil service is non-political that it is expected to serve the government of the day to the best of its ability and in the best interest of the country it serves. If demonstrable standards of impartiality are observed by the senior civil servants, much of the politicians' distrust will begin to disappear. It is a lesson that both politician and civil servant must learn if the state is to endure and prosper. Of course, there have been occasional attempts on the part of certain political leaders in one or two African countries consciously to inject politics into the civil service by requiring membership of the ruling political party as a condition of advancement in the service. Such a practice is against the spirit and intendment of any parliamentary system of government.

One common feature of the organisation of the public services throughout Commonwealth Africa has been the establishment of a public service commission which is charged with the function of ensuring impartiality in the question of recruitment, tenure and removal of members of the local civil service. Such a commission is usually so composed as to inspire confidence in the populace, and its main concern is that membership of the civil service should be based on merit and on no other consideration. It does not, of course, normally conduct competitive examinations for new recruits to the civil service as does its British model, although it may do so in addition to or in substitution for the normal procedure of basing

appointments, promotion and discipline upon certain well-established standards laid down in the relevant General Orders or a body of comprehensive civil service regulations. The public service commission is one of the means of allaying the fears and anxieties of minority groups in each state. The extent to which it achieves the main purpose must depend on the spirit in which it is run.

Each member of the Commonwealth in Africa has also a police force and a corps of the armed forces. The character of the police forces and of the armed forces of a territory depends to a great extent upon its composition and the length of its establishment at independence. Countries like Nigeria and Ghana have been more fortunate than their counterparts in East and Central Africa, in that they have each had about a century of existence during most of which period Africans had been serving almost up to the highest levels by the time self-government was achieved. The same is generally true of the armed forces. The somewhat different picture in the rest of Commonwealth Africa can be attributed to the same factor of European and Asian presence that, as we have seen, has affected the civil services of these territories. Before and since independence, however, Commonwealth Africa has been taking great strides both in the police force and in the armed forces. The process of Africanisation has gone on apace and some territories, like Nigeria and Ghana, have achieved complete Africanisation of the police forces and of the armed forces; others, like Uganda and Tanzania, are approaching the stage at which they can dispense with expatriate supervision. Each territory has for long established its own police colleges for training local men and women for the force, and great has been the contribution of serving British officers to this development. Many of the promising products of these colleges have also received further training in British Police institutions and have thereby been equipped for advanced service to their countries.[24]

As far as the armed forces are concerned, progress has been somewhat slower even in the case of the more fortunate territories because the armed forces have never been large in any territory and have been officered for the most part by the British. Local training facilities for their personnel have been more limited than those of the police forces because of the higher costs of technical equipment and training. Under the protective umbrella of the British Navy, Army and Air Force, there was no pressing need for accelerated training of the local armed forces in these territories. It must nevertheless be said that, shortly before and ever since independence, outstanding members of the armed forces in each territory have in increasing numbers been given the highest training

[24] The Nigeria Police rendered distinguished service with the United Nations Organisation in Congo, and was placed in charge of the headquarters there for nearly two years. Moreover, a number of senior Congolese police officers had, at the request of the republic, since been trained in Nigerian Police Colleges.

in Sandhurst and other British military institutions. It is an irony of history that some of the products of these renowned institutions should have found themselves obliged to play such leading roles in the recent *coups d'état* in Nigeria and Ghana. Perhaps the British were right, for whatever reasons of expediency or of logistics, to have kept the army in each territory small, whilst placing the emphasis on the development of an effective police force. One of the trappings of sovereignty which the leaders of some of these newly independent African states set out deliberately to acquire is a greatly enlarged army, primarily for reasons of national prestige and aggrandisement, and secondarily for the purpose of joining with other countries in the crusade against apartheid and Spanish and Portuguese imperialism. After the recent *coups* in two territories, the earlier military trouble in a third territory and the current military manoeuvres in two more, one may be permitted to wonder whether Professor M. Janowitz, in his *The Military in the Political Development of New Nations*, is not right in suggesting that what the newly independent states of Africa and Asia need are not large armies, but large and effective police forces.

The main reason that has been advanced for the *coups* in Commonwealth Africa and elsewhere on the continent has been the desire for wiping out corruption in all its forms and putting an end to tyranny and oppression. While this may be obviously the case in respect of one country, it does not seem that this reason sufficiently explains the happenings in another. No doubt, individual ambition and ethnic jingoism have, on recent showing, played their part. This is probably an inevitable phase through which the newly independent countries in Africa must pass in their search for proper standards of political behaviour and for the realities of national unity and independence. There are no short cuts to democracy. Democracy cannot be taught by the rule of thumb; it must be learned and appreciated by practice and the force of example. It is to be hoped that all concerned have learnt their lessons from the recent *coups* in Africa, and that there will be no recurrence of the traumatic experience of what one may regard as the growing pains of political adolescence on the part of the new states.

The Special Position of the Judiciary

It is, however, in the sphere of the judiciary that, as far as Commonwealth countries in Africa are concerned, British inheritance is most marked. Each territory is equipped at independence with a well-organised system of courts, ranging from the varying grades of local or customary courts through a chain of graded magistrates' courts to the High Court or the Supreme Court at the apex. While the pattern on the West Coast has been the establishment of an integrated system between the customary courts and the British-established courts so that a system of appeals runs to the

highest court, the East and Central African pattern has generally been one of parallel developments between the local or customary courts and the British-established ones, although integration has been carried far in recent years even in these areas. An integrated system has the virtue of promoting the gradual evolution of a common law for each territory. Over and above these national legal systems were established three territorial courts of appeal, one for West Africa under the West Africa Order in Council of 1928, another for East Africa under the Constitution of the East African Common Services Organisation and a third for the three territories that made up the former Central African Federation. To the West African Court of Appeal, appeals formerly lay from the Supreme Courts of each of the four West African Territories until Ghana and Nigeria respectively withdrew from it on the attainment of independence. To the Court of Appeal for Eastern Africa still lie appeals from Uganda, Kenya and Zambia. Until the attainment of republican status by many of the newly independent states in Africa, the final Court of Appeal was the Judicial Committee of Her Majesty's Privy Council, the decisions of which were binding upon courts of these countries. Appeals no longer lie to the Privy Council from Ghana, Nigeria and Tanzania.

Through this organisation of the courts in English-speaking Africa and the reception of English law operating side by side with the indigenous customary laws of the various territories, the influence of English law and of English ideas of the administration of justice has been all-pervasive. The urge for innovation, which our earlier description has shown to be so evident in the executive and the legislative spheres, has been at its minimum in the judicial spheres, a tribute to British law and British justice that is the envy of the civilised world.

The independence of the judiciary as understood in British constitutional law and practice is the ideal after which the vast majority of the leaders of the newly independent African states are constantly striving. The independence constitutions of most of these territories usually carry provisions establishing a Judicial Service Commission, the function of which is to ensure that the appointment (and, in one or two territories, even the removal) of judges of the superior courts are insulated from political influence. The system seems to work well where the local judiciary is still largely manned by expatriate personnel. This is because the politicians have yet to turn the searchlight of nationalist scrutiny and suspicion of authority in that direction. Where, however, the Bench is or is almost wholly African, the institution of the Judicial Service Commission becomes suspect, especially when it is tied up in the politician's mind with the existence of a tribunal composed of local and other Commonwealth judges whose recommendations as regards removal from judicial office are directly subject to the final arbitrament of the Judicial Committee of the Privy Council.

While a purely local judicial tribunal of inquiry could have been substituted for the one linked to the United Kingdom, the politicians have in Ghana and Nigeria preferred to abolish the investigating tribunal because of their rejection of the Privy Council as their final court of appeal; Sierra Leone bids fair to following suit in her current constitutional proposals. The Judicial Service Commission is still in use, with varying degrees of effectiveness, in Eastern and Central African countries, because the higher Benches there are still largely, if not exclusively, expatriate.

Despite these changes, however, the ideal of the independence of the judiciary still remains the object of conscious aspiration in each of the newly independent states in Africa. There is a happy conjunction in these societies between Dicey's concept of the rule of law and the African indigenous concept of the maintenance of the social equilibrium as the goal of good government. This desire to ensure the orderly conduct of public affairs in a manner that should protect the individual against being pushed around will be seen in the preference of the African leaders for the system obtaining in the United Kingdom for the appointment and removal of judges. For the Judicial Service Commission arrangement has been substituted the Westminster model whereby, as the politicians see it, judges of the superior courts are appointed by the President or the Governor-General on the advice of the Premier and are made removable only on the presentation of an address by each House of the legislature (or by the only House of a unicameral legislature) supported by the votes of not less than two-thirds of the members of the House. There has, so far as one is aware, been no instance when this procedure has had to be used in removing a judge of the High or Supreme Court of any newly independent African state. This is in keeping with the British tradition according to which, barring a doubtful instance, no judge has been so removed in the United Kingdom since the inception of this practice. The only instance in Africa in which the principle of the independence of the judiciary has been compromised occurred when the then President of Ghana chose to remove the country's Chief Justice who had dared to give a judgment of which the former disapproved.[25] This arbitrary arrogation of presidential power was roundly condemned even more in Commonwealth Africa itself than elsewhere in the world. No greater testimony is required to the British legacy of the ideal of independence of the judiciary and the rule of law than this triumph of the human spirit over material ends.

THE NEW COMMONWEALTH AND AFRICA

If we may summarise, it is clear from the foregoing analysis that

[25] It is on record that other judges of the superior courts were also similarly removed later. The subsequent removal from office of the Chief Justice of Sierra Leone might also have been for political rather than judicial reasons; the evidence is inconclusive.

Commonwealth Africa, despite many departures from the Westminster model in the executive and to a lesser extent the legislative spheres, still retains many of the established British principles and forms of government. The Cabinet system is still adhered to, at least in essentials, even by the countries that have adopted the system of presidential executives on the American and the French patterns. And although such countries cannot be said to follow the principle of ministerial responsibility to the letter, it is usually the Head of State himself who is withdrawn from strict accountability to the legislature and not the Ministers who everywhere remain members of the legislature; and this is so, notwithstanding the new-fangled theory of the supremacy of the party and the dark shadows which it casts upon the Cabinet system of government.

There must also be a constant aspiration after the ideal of social justice. This has been seen in the understandable concern shown by most of the new states for fundamental rights in the various constitutions, for a non-political and incorruptible civil service, for an efficient and effective police force, and for a non-political and patriotic corps of the armed forces. There is, above all, the anxious desire to maintain the forms and the ideals of the administration of justice which they openly avow to be characteristic of British rule and with which they have, on the whole, refrained from tinkering so far. In this respect, the tendency has been towards closer approximation to British models than has been the case in the other two branches of government. The independence of the judiciary is, by and large, jealously guarded by even those that practise strong government. More than that, there is a growing *rapprochement* between the received English common law, the doctrine of equity, and the statutes of general application on the one hand, and the rules of customary law in the sphere of land tenure, marriage, succession and inheritance, on the other. No one who has had the chance of attending the Third Commonwealth and Empire Law Conference in Sydney, Australia, in September 1965 could have failed to notice the growing sense of interdependence and shared ideals among the assembled delegates, nurtured and enriched as they all were by the English common law. While details of the organisation of parliament and of courts may differ, the essential principles and practices of the administration of justice according to law are often similar, if not identical. There can be no doubt that a Commonwealth law is already very much under way.

Since Mr. Harold Macmillan's wind of change speech in the then Union of South Africa,[28] the pace of advance in Africa from dependent status to full membership of the Commonwealth has quickened in response to the new challenge. It has sometimes been said

[28] An address to the South African Parliament, Cape Town, on February 8, 1960.

that, whereas the chief aim of the older members is consultation, that of the newer members is aid. There is still a good deal of truth in this assertion. But the newer nations of Africa and Asia have reinforced the concept of equality as a distinctive feature of Commonwealth relationship. It would be easy to suggest that the new Commonwealth, in spite of its many paradoxes, derives its energy and resilience from the co-operative endeavour among its members in the legal, the economic and the social fields. Thus, in addition to the varied training provided by British Universities and the Inns of Court, the British Institute of International and Comparative Law has continued to provide invaluable legal assistance, especially to the newer members; and many of the other members have been rendering similar technical assistance to their colleagues; for example, Nigeria has been supplying legal personnel to the Eastern, the Central and one of West African countries for well over five years. The provision of economic aid by Britain and some of the more developed members to the developing ones has always been one of the basic assumptions of the new Commonwealth.

There is, however, no better testimony to the new emphasis on equality of status as between the members than the epoch-making event which took place in Lagos, Nigeria, in the first half of January 1966, just before the *coup d'état*. For the first time, a Commonwealth Prime Ministers' Conference was held outside London, in Africa's most populous country, in an effort to resolve the Southern Rhodesian problem. An institution that can show such maturity, enterprise and resource deserves to live and flourish. So long as the English common law, and the ideals of justice and of liberal democracy continue to hold sway over men's mind, there will always be a future for the Commonwealth of Africa.

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STATUTES

The Matrimonial Homes Act 1967

In spring 1968 this Act looms much larger than it did when it received the Royal Assent on July 27, 1967, or when it was brought into operation by the Lord Chancellor at the beginning of 1968.[1] The reason is that the Divorce Reform Bill, now before Parliament, seeks to sweep away the concept of the "matrimonial offence" as the major ground for divorce, but has not attempted to grapple with the real economic battles that are in fact fought behind the smoke-screen of whether a matrimonial offence has been committed by him, or by her, by neither, or by both, and, if so, with what effect on the other. What such battles really involve is the simple question: must he continue to pay money to her (or, much more rarely, she to him), and (far more complex because the choices are so open) how much and over what period?

The Matrimonial Homes Act does not attempt to deal with these questions. It is not the correlation and amendment of our present rules about family property and maintenance which are so urgently needed now, and which the dissipation of the smoke-screen of "matrimonial offences" will render even more necessary. This is not property legislation; it is not even an amendment of our provisions about financial relief in matrimonial proceedings, but it makes some provisions, short of title, about *de facto* possession and use of the most important single piece of property owned by most families and needed by all human beings, namely, a place of residence. This is effected within the traditional mould of "rights" for every woman with a living husband, be she the bride of ten minutes or the wife of forty years; able-bodied, childless and income-earning, or confined by dependent children, sickness or infirmity. The Matrimonial Homes Act has made no breach in the traditional mould that, in matters of family property law, one spouse should be awarded rights as against the other spouse or other people generally, but that children of the family do not enter this framework of "rights." I venture to suggest that what was intolerable about the decision in *National Provincial Bank Ltd.* v.

[1] By the Matrimonial Homes Act 1967 (Commencement) Order 1967, S.I. 1790. At the same time the Land Charges (Matrimonial Homes) Rules 1967, No. 1791, were issued, providing for the registration, renewal and cancellation of a land charge under the Act affecting unregistered land. The Land Registration (Matrimonial Homes) Rules 1967, S.I. 1792, made under the Land Registration Act 1925, s. 144, provide for the registration or renewal of a notice or caution protecting a spouse's charge under the Act, or of a court order obtained under s. 2 (2) of the Act, where the land is registered. These rules provide also for the service by the Chief Land Registrar of a notice warning off such a caution. Forms 99 and 100 are incorporated. As to costs, see *Practice Direction* [1968] 1 W.L.R. 365; [1968] 1 All E.R. 456.

Ainsworth [2] was not that a husband was enabled to deprive his wife of a home, but that a parent was enabled to do so to his infant children dependent on him, without having made suitable alternative arrangements for them.[3] With this situation the Matrimonial Homes Act does not deal. The spouse can protect his or her occupancy by registering it as a charge or caution, whether he or she has children or not. If no spouse is involved (*i.e.*, the children's other parent is dead, or has deserted or is simply away) the children are not protected in the presence of any other custodian. The Act is in fact a legislative restatement of the traditional common law duty of consortium. At common law this amounted broadly to rights for the husband and duties for the wife, because the husband had all the power of property of which the common law stripped every woman on marriage. Twentieth-century legislation now transforms this into a right to remain in a particular home—for a spouse who makes no claims as owner.

The Act was primarily directed towards reversing the effects of the decision of the House of Lords in *National Provincial Bank* v. *Ainsworth*.[4] Its main provision is that where a married person, because of an estate or interest or contract or under a statute, is entitled to occupy a dwelling-house and his or her spouse is not so entitled, provided that that house has at some time been the matrimonial home of the spouses,[5] the spouse without the property right has a right of occupation in the house. If in occupation, she (or he) cannot be evicted by the other spouse without a court order, and if not in occupation, the court may give her (or him) leave to enter and occupy the house.

This means that the Act goes considerably beyond the line of authority stemming from *Bendall* v. *McWhirter*,[6] which never extended to a right of re-entry for a spouse who had once vacated the matrimonial home. On the other hand, the Act does not revive the full doctrine of *Bendall* v. *McWhirter* because although a court order, once obtained, will apply to those deriving title from the spouse with the property right,[7] a registered charge of an occupation

[2] [1965] A.C. 1175.

[3] A similar example under the Inheritance (Family Provision) Act 1938, as amended, was *Re Ferrar's Application* [1966] P. 126, in which a father was similarly able to ensure that his five young children would be evicted and his house sold by the simple expedient of leaving all his property to his mistress after his wife had divorced him. It is not clear that the provision in Sched. 1 to the Family Provision Act 1966, providing for interim orders to be made, overcomes the difficulty, since it still provides only for "such sum or sums" to be "paid to or for the benefit of the applicants."

[4] [1965] A.C. 1175.

[5] Matrimonial Homes Act 1967, s. 1 (8). It could not, therefore, be invoked by a wife wanting to instal herself in a residence occupied by her husband and a mistress, as in *Nanda* v. *Nanda* [1968] 2 W.L.R. 404; [1967] 3 All E.R. 401.

[6] [1952] 2 Q.B. 466.

[7] Matrimonial Homes Act, s. 2 (3). By s. 2 (3) (b) such persons are given the same rights as the spouse with a property right to apply to the court under s. 1 (2) and the court has the same powers to make orders under s. 1 (3) (4) and (5).

right is void as against the trustee in bankruptcy or other person representing the estate if the spouse with the estate or interest becomes bankrupt or insolvent.[8] This means that the Act decisively rejects any doctrine of homestead exemption,[9] and that creditors will not be postponed to a spouse's claims, a disturbing feature of the decision in *Bendall* v. *McWhirter*.[10]

Under section 1 of the Act, the spouse " not so entitled " is given a right of occupation as against a spouse " entitled to occupy a dwelling house by virtue of any estate or interest or contract or by virtue of any enactment giving him or her the right to remain in occupation." Clearly, if both spouses have a present proprietary right, they will both have a right of occupation stemming from it. If the house is in the husband's name, but the wife is claiming a beneficial interest because she has made some mortgage payments, or if a husband has erected a row of shelves in a house owned by the wife,[11] and considers this the kind of work " usually done by contractors," [12] either may be able to claim a beneficial interest under the doctrine in *Rimmer* v. *Rimmer*.[13] Each should presumably register his or her right of occupation in the meantime, and others will be able to have the registration cancelled once the beneficial interest and right of occupation by virtue of it have been established. What, however, is the position if one spouse has a future or contingent interest, giving him or her no present right of occupation? Suppose, for example, a house is settled on a husband for life, then wife for life, then on their children. Can the wife assert a right of occupation under section 1?

The right of occupation ranks as a charge having the same priority as an equitable interest created at the date when the spouse acquires his (or her) estate or interest, or the date of the marriage, or the date of the commencement of the Act, whichever happens last.[14] It is not an overriding interest, but as a minor interest it will need to be protected by an entry in the register, otherwise it will not bind a purchaser for value. One such interest only is registrable as a land charge, class F,[15] but the appropriate

[8] s. 2 (5).

[9] As found in many Western States such as Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington, which have one form or another of total or partial community of property between spouses.

[10] See, *e.g.*, *Bradley-Hole* v. *Cussen* [1953] 1 Q.B. 300.

[11] *Pettitt* v. *Pettitt* [1968] 1 W.L.R. 443 (C.A.).

[12] *Button* v. *Button* [1968] 1 W.L.R. 457 (C.A.) It is surely curious that the rights of a spouse should depend on whether the work done is of a kind which firms find it profitable to undertake on a considerable scale. Suppose a majority of barristers' wives in London agreed to employ a firm of contract cleaners in their home. Could each wife then claim a beneficial interest if one day she polished a table or dusted a shelf?

[13] [1953] 1 Q.B. 63 (C.A.). For doubts expressed in the House of Commons on this point see H.C.Deb., Vol. 750, col. 2719.

[14] s. 2 (1).

[15] s. 2 (6). Provision is made by s. 5 for the Chief Land Registrar to cancel the registration of the charge on its termination by death or divorce unless otherwise ordered.

time for registration is clearly immediately on the conclusion of the marriage or acquisition by the other spouse of a property right. The most sensible arrangement would therefore be to arrange a convenient means of registration of a right of occupancy at the conclusion of the wedding ceremony or conveyance of every dwelling-house to an owner-occupier. It is difficult to imagine so prosaic an approach being adopted, and no doubt "moral" persuasion will continue to be brought to bear on brides and young wives to defer registration until after friction has developed, and the right been lost. Such persuasion is still potent against conveyance of the matrimonial home into the joint names of the spouses; hence the counter-argument about estate duty avoidance in circumstances where liability to estate duty is the remotest of possibilities.[16] And most spouses will arrange a mortgage before the wedding takes place.

As between the spouses, what are the implications of the new Act? The owner spouse can no longer evict the other without a court order. The common law exceptions to consortium, where the spouse has committed adultery, or the other spouse reasonably believes that she or he has done so, do not apply. No sanctions are provided, however, against the owner spouse who locks the other out except the right of the evicted spouse to obtain a court order to re-enter and occupy. The attitude of the police may in the meantime be important to the evicted spouse. Eviction by an owner spouse of a spouse with a court order will constitute contempt of court. The wide powers given to the court under section 1 (2) to make orders "declaring, enforcing or terminating" rights of occupation "or regulating the exercise by either spouse of the right to occupy the dwelling-house" will enable the court to order the eviction of the owner spouse. By section 1 (3) the court has very wide discretion to "make such order as it thinks just and reasonable, having regard to the conduct of the spouses in relation to each other and otherwise, to their respective needs and financial resources, to the needs of any children [symptomatically mentioned after enumeration of all matters between the spouses] and to all the circumstances of the case." In particular the court may divide the occupation rights in the house between the parties, order one to make periodical payments to the other in respect of the occupation, or impose on either spouse obligations for repair and maintenance of the house or discharge of liabilities in respect of it. So wide a discretion for county courts judges[17] will undoubtedly lead to considerable variation in orders made in similar circumstances by different judges. Anomalies and "forum-shopping" may be anticipated.

[16] e.g., *Bedson* v. *Bedson* [1965] 2 Q.B. 666. The Lord Chancellor referred to estate duty advantages in the context of joint tenancy and the Matrimonial Homes Bill in H.L.Deb., Vol. 685, col. 1150.

[17] County courts, as well as the High Court, have jurisdiction under s. 1 (6) whatever the rateable value of the house.

The right of occupation is to continue only so long as the marriage subsists [18] and the owner spouse remains entitled, and it will be terminated by the death of the owner spouse or the termination of the marriage otherwise than by death unless the court has, during the subsistence of the marriage, made an order directing otherwise.[19] This, then, will be the major advantage of applying for a court order during the subsistence of a marriage that starts to go wrong, and the major use of the Matrimonial Homes Act in cases of divorce. The court will be able to protect the occupying spouse against termination of the right by divorce or even death (but not bankruptcy of the owner spouse), as it has ingeniously been able to do where the spouse wishing to remain in occupation can prove a beneficial interest under the *Rimmer* v. *Rimmer* doctrine.[20] The court granting a decree of divorce or nullity in cases where one spouse has a statutory tenancy or a tenancy under the Rent Acts may also make an order transferring that spouse's rights of tenancy to the other former spouse as from the date of the decree.[21] The right of succession to tenancy by the members of the family of a deceased statutory tenant will also enure to the family of the person deemed under such an order to be a statutory tenant.

The Act does not, however, extend to local authority tenancies under the Housing Acts, since "landlord" and "tenant" have in the Act the same meaning as in the Increase of Rent and Mortgage Interest (Restriction) Act 1920,[22] and a "statutory tenancy" has the same meaning as in the Housing Repairs and Rents Act 1954. Neither of these Acts applies to the Housing Acts. Thus the kind of spouses most likely to need this kind of paternalistic protection will not be covered by the Matrimonial Homes Act.

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[18] s. 1 (8).
[19] s. 2 (2).
[20] As in *Cook* v *Cook* [1962] P. 181.
[21] s. 7.
[22] s. 7 (8)

* It is a pleasure to acknowledge assistance received in preparing this paper from my colleague Mr. S. Roberts.

REPORTS OF COMMITTEES

The Street Report on Anti-Discrimination Legislation [1]
Report of the Committee on Immigration Appeals [2]

A striking feature of the development of the law in England, Wales and Scotland in relation to ethnic minorities is the interaction between immigration control and legislation designed to promote racial integration. For this reason it seems no coincidence that the Report of the Committee on Immigration Appeals and the Street Report on Anti-Discrimination Legislation were published within three months of each other in 1967. When these clear, forthright and scholarly documents are read together it becomes obvious that the cause of the alien has become inextricably bound up with that of the Commonwealth citizen [3] and that both are causally related to the movement to extend the Race Relations Act 1965 [4] to deal with racial discrimination in employment, accommodation, the provision of services and those places of public resort not covered by the existing law.

The critics of the Government's illiberal White Paper on *Immigration from the Commonwealth*,[5] published in August 1965, argued that the Government was taking a firm line to stop coloured immigration but was doing virtually nothing to make immigration procedures fairer or to create equal opportunities for those already here.[6] To this the Government responded with the announcement, in November 1965,[7] that a committee was to be appointed under the chairmanship of Sir Roy Wilson, Q.C. (President of the Industrial Court), "to consider whether any, and, if so, what, rights of appeal or other remedies should be available to aliens and Commonwealth citizens who are refused admission to, or are required to leave, the country." [8] The Committee took well over a year

[1] *Political and Economic Planning*, November 1967.
[2] Cmnd. 3387. August 1967. 8s.
[3] This refers to all those British subjects and protected persons who do not have an automatic right of entry into the U.K. in terms of the Commonwealth Immigrants Act 1962, ss. 1 and 2, and the Commonwealth Immigrants Act 1968, s. 1. This note went to press before the passing of the latter measure, and prior to the publication of the Race Relations Bill 1968.
[4] For comment see Hepple (1966) 29 M.L.R. 306.
[5] Cmnd. 2739.
[6] *e.g.*, Memorandum of Evidence submitted by the National Committee for Commonwealth Immigrants to the Committee on Immigration Appeals, dated May 26, 1966, para. 3.
[7] The Committee's warrant of appointment was issued only on February 28, 1966.
[8] The inclusion of aliens in the terms of reference was the culmination of an agitation which has a long and distinguished history: *e.g.*, Laski, "Discretionary Power" (1935) *Politica* 278; *Reform of the Law* (ed. Glanville Williams) (1951), p. 55; Thornberry, "Dr. Soblen and the Alien Law of

to gather written and oral evidence, to gain first-hand knowledge of the operation of immigration appeals in the United States and Canada, and to visit India and Pakistan to study the working of the entry certificate system.

At about the same time, the Race Relations Board—created almost as an afterthought by the Race Relations Act 1965 [9]—was undertaking a series of measures designed to increase its own jurisdiction. Most important of these was the commissioning, with the National Committee for Commonwealth Immigrants, of a survey of six representative areas of immigrant settlement. This revealed "substantial discrimination" largely based on colour against coloured immigrants in employment, housing and the provision of services.[10] After operating for a year in the limited area of certain places of public resort, the Race Relations Board reported considerable success for the processes of conciliation where the law was clear and unambiguous and backed by an ultimate legal sanction. It found no reason to suppose that employers of labour or those who sell houses would be any less susceptible to these processes than publicans and recommended that the Race Relations Act be extended to cover employment, housing, financial facilities and places of public resort not covered by the present Act.[11] It also drew attention to a number of deficiencies in the drafting of the Act. To assist Parliament should it be decided to amend and extend the Act, the Board and the National Committee for Commonwealth Immigrants appointed Professor Harry Street (as Chairman), Mr. Geoffrey Howe, Q.C., and Mr. Geoffrey Bindman (the Board's Legal Adviser) to investigate anti-discrimination legislation in other countries, to assess its effectiveness and to consider what type of legislation Parliament might consider most suitable. Three months before this small Committee's Report was published, the then Home Secretary announced the Government's intention to introduce amending legislation. As if to emphasise that legislation could not in itself increase Britain's capacity to absorb immigrant minorities, he added that the present system of immigration control would be maintained and, where necessary,

the United Kingdom" (1963) 12 I.C.L.Q. 414 and *Stranger at the Gate*, Fabian Research Series 243 (1964). The unsuccessful attempts to write an appeals procedure into the Commonwealth Immigrants Act 1962 are described by Thornberry, "Law, Opinion and the Immigrant" (1962) 25 M.L.R. 654 at pp. 666–667.

[9] See Hindell, "The Genesis of the Race Relations Bill" (1965) 36 *Political Quarterly* 390.

[10] *Political and Economic Planning, Report on Racial Discrimination* (1967).

[11] Report of the Race Relations Board for 1966–67 (H.M.S.O., April 1967), esp. paras. 21–28 and 61–67. In the first 18 months of its operation the local conciliation committees of the Board received a total of 884 complaints. Of these, 614 were outside their jurisdiction, no less than 287 being in respect of employment and 81 in respect of housing. Of the cases with which they were competent to deal 62 were settled by conciliation, 103 were not substantiated, four were referred to the Attorney-General, and 51 were still under investigation. (Information supplied by the Race Relations Board, December 7, 1967.)

strengthened.[12] The single amelioration conceded was the acceptance of the Wilson Committee's proposal that there should be a system of immigration appeals.[13] Opposition spokesmen have, in general, taken the view that it is important to retain a consensus that immigration into Britain must continue to be restricted and that those who are here must be afforded equal treatment with the native-born, but have reserved the right to criticise the details of the proposed legislation.[14]

If the detailed proposals contained in these Reports are implemented, race relations law (as this nascent subject is likely to be called [15]) will be placed on foundations which measure up to modern standards of administrative justice. Both Reports are the fruit of comparative study. The Wilson Report contains useful information on the position relating to immigration appeals in the United States and Canada, draws heavily on the Franks Report,[16] and considers the relevance of procedures in the French system of *droit administratif*.[17] Nearly half the Street Report is taken up with a description of laws against discrimination in the United States and Canada (some fifty-nine pages) and each of the authors saw a state anti-discrimination commission in practice and discussed the work of the commissions with a wide range of specialists.[18] Nearly all the criticisms which can be made of the proposals arise from the limited terms of reference of each Committee. The Wilson Committee was precluded from examining the substance of immigration control; the Street Committee was asked to examine the effectiveness of legislation abroad, but not the desirability of using it against racial discrimination in Britain. The extent to which these limitations affected the socio-legal perspective of the Reports will be discussed in the last section of this note.

1. *Anti-discrimination legislation*

The Street Report proposes that the Race Relations Act should be extended to cover all places (whether maintained by the

[12] H.C.Deb., Vol. 750, col. 747.

[13] H.C.Deb., Vol. 754, col. 445. The Home Secretary (Mr. R. Jenkins): "We recognise that a system of effective control over immigration . . . will be acceptable to those directly affected by it and to public opinion generally only if its fair and impartial application is guaranteed . . ."

[14] Mr. Q. Hogg, Q.C., for the Opposition, felt some doubt about the "elaborate judicial or quasi-judicial structure which Sir Roy Wilson recommended in his Report. I think this is an administrative problem on which the House should fundamentally keep its control": H.C.Deb., Vol. 754, col. 450. Mr. Jenkins stressed (*ibid.* col. 456) that the Home Secretary would retain responsibility for general policy and for the efficiency of the system as a whole.

[15] See A. Lester (1967) 117 New L.J. 1238.

[16] Report of the Committee on Tribunals and Enquiries, Cmnd. 218 (1957).

[17] Wilson Report, paras. 107 and 124.

[18] In *Freedom, the Individual and the Law* (1963), p. 281, Professor Street anticipated the need for this kind of investigation into foreign anti-discrimination legislation when he pointed out that "the Royal Commission and the Departmental Committee seldom seem to be an effective instrument for making this type of comparative study of a legal system in operation."

Crown,[19] public bodies or any other persons) offering accommodation, goods, services or facilities to the public. To achieve this result, it eschews the drafting technique of a general definition (" any place to which the public is customarily admitted " is the Ontario formula) since this might make those administering the law reluctant to invoke it for fear of their actions being challenged in the courts as *ultra vires*. Instead it proposes to follow the Uniform Law Commissioners' Model Anti-Discrimination Act which begins with a general definition and continues by listing a small number of instances " by way of example, but not of limitation." [20] In regard to motor insurance it is pointed out that differential rates might be justified for sound commercial reasons such as inexperience of British roads, but where discrimination is proved to be racial,[21] the Act should apply and should be supplemented by administrative pressure on the insurer by the Ministry of Transport.

In the area of employment—described as one " of exceptional difficulty in view of the long-standing practice in industry for the settlement of disputes by negotiation " [22]—the Report proposes to subject recruitment, dismissal, conditions of service, training and promotion of employees, the provision of facilities for them and admission to and expulsion from trade unions to legal control. It proposes to meet the fear expressed by some trade unionists and employers that a privileged group of employees will be created [23] by a declaratory provision that an employer should not be required to give preferential treatment to any individual on grounds of racial imbalance, that an employer should be entitled to act on the results of a professionally developed aptitude test, and that selection on non-racial grounds is permissible. At the same time, it suggests that detailed voluntary plans in particular areas to redress racial imbalance should be permitted provided they have received the prior approval of the Race Relations Board.

[19] This follows from a general proposal that the Act should bind the Crown. In regard to Crown employment it is suggested that a Minister should be empowered to create exceptions by statutory instrument. Unfortunately, the Committee did not examine the sometimes bizarre workings of the Civil Service Nationality Rule (made by the Civil Service Commissioners with the approval of the Treasury and the Foreign Secretary under the Civil Service Order in Council 1956) on which see Report of the Race Relations Board for 1966–67, App. VI, and Hepple, *Race, Jobs and the Law in Britain* (London, 1968), Chap. 10.

[20] Street Report, para. 88.

[21] P.E.P. Report, para. 86, showed that the main forms of discrimination were the charging of higher rates or refusing to insure coloured immigrants altogether.

[22] Street Report, para. 129.1. The P.E.P. Report, paras. 14–53, found that " discrimination in employment is the biggest single criticism in immigrants' spontaneous criticisms of life in Britain." Thirty-six per cent. of all immigrants interviewed claimed discrimination in employment and objective testing proved this to be an understatement.

[23] *e.g.*, General Council's Report, 99th Annual Trades Union Congress, 1967, pp. 188–189.

In proposing that the law should cover municipal and other public housing, the Report takes the realistic view that discrimination will not be eliminated without making provision for detailed control over local authorities requiring them to satisfy the Minister of Housing and Local Government that they carry out their complex duties to rehouse and their powers to provide housing in a non-discriminatory fashion.[24] This would involve the amendment of legislation such as the Housing Act 1957 and the Town and Country Planning Act 1962 and would involve major changes in local government practice which might usefully be applied for more general purposes than the integration of ethnic minorities. The Reporters were unanimous in proposing that the law should extend to privately rented accommodation including houses let in multi-occupation,[25] and to sales of houses by builders and private developers. Two members of the Committee took the view that sales by the owner-occupier could not logically be excluded, but the third, Mr. Howe, felt that an Englishman's home is "so fundamental an aspect of [his] financial and domestic arrangements that it should not be the subject of legal regulation."[26] This argument has been the constant theme of groups opposing fair housing laws in the United States. Every student of the law is familiar with restrictions on the sale and use of property from the rule against perpetuities to modern town planning legislation: is concern for the social effects of racial discrimination any less a reason for restricting rights in private property than the social considerations which prompted those other restrictions? A more subtle and frequently whispered argument against a fair housing law is that when a coloured family moves into a previously all-white neighbourhood, property values are bound to decline. Research in the United States has shown that the entry of non-whites in these circumstances is much more often associated with price improvement or stability than with price weakening.[27] What sometimes results in panic sales is the *fear* of declining property values: all that people have to fear in this situation is that they will become victims of their own prophecies. A total prohibition on discriminatory selling, on the other hand, is capable of protecting all vendors.

The Report proposes, as well, to bring estate agents, banks, building societies and other lending agencies within the scope of

[24] Street Report, para. 181; and see P.E.P. Report, paras. 72–84; Rex and Moore, *Race, Community and Conflict: a study of Sparkbrook* (London, 1967), esp. pp. 82–85; R. W. Evans, "Immigrants and the Housing Laws," I.R.R. *Newsletter* (New Series), I, 9, p. 848.

[25] Para. 183.

[26] Para. 184.

[27] See Pearl & Terner, "Fair Housing Laws: Halfway Mark" (1965) 54 Geo.L.J. 156. The Street Report proposes the prohibition of "block-busting" which occurs when an individual spreads the appropriate rumour to encourage panic-selling to himself, followed by resale to incoming Negroes at inflated values (para. 184.9).

the law. Discriminatory covenants in conveyances and leases would be declared void.[28]

"Some relationships," the Reporters argue, "may well be so personal and intimate that legal intervention is either likely to be ineffective or is politically or socially unacceptable."[29] On this basis it proposes the exemption of employers of domestic servants, certain small employment units and resident landlords who would have to share living accommodation or bathroom or toilet facilities with other tenants.[30] In regard to the first two of these proposed exemptions the concept of the "intimate personal relationship" seems inappropriate. The Report itself points out that there is no occasion to create an exception where services of a personal nature are offered to the public. From a logical point of view, if the law does not permit racial discrimination by a hairdresser in the choice of his customers, why should it permit him that discrimination in the choice of his employees? In the end, the proposed distinction is no more than a rationalisation of a personal and political judgment of where to draw the line. A more compelling, and separate, reason put forward in the Report for the exemption of small units is that in the early stages of legislation the supervising agency could not reasonably be expected to assume responsibility for such small units.[31]

Turning now to the proposals regarding enforcement of the law, the underlying philosophy of the Report is that the purpose of the law is not to seek out and punish discriminators but to create a climate of opinion which will obviate discrimination.[32] Hence it stresses conciliation machinery as a major feature of the legislation. The aim is to secure a settlement by persuading the discriminator to cease discriminating and, only where conciliation fails, to provide for adequate enforcement.

The criteria which, in the view of the Reporters, the machinery must satisfy are fairness, speed and effectiveness. In each of these respects it is present to fault the existing machinery.[33] The Report proposes that the present structure of the Race Relations Board and its local conciliation committees should be retained,[34] but these bodies should be expanded and strengthened, in particular by affording Board members full-time tenure for five years and by conferring on the Board power to take affirmative action, for

[28] S. 5 of the present Act provides that racial restrictions on the disposal of certain tenancies are to be treated as unreasonable.
[29] Para. 121.1.
[30] Para. 188.
[31] *Cf.* Title VII of the federal Civil Rights Act 1964, which, for this reason, exempted employers with fewer than 100 employees when it first came into operation and provided for this figure to be annually reduced until it reached 25.
[32] Compare this with the approach of the West Indian Standing Conference (an immigrant body) which proposes criminal sanctions for repeated violations: *Play the Black Man* (W.I.S.C., 1967), p. 4.
[33] See (1966) 29 M.L.R. 306 at p. 309.
[34] Paras. 186.2, 189.1, 141–148.

example, by initiating complaints itself and commanding the presence of individuals or the production of documents before a local committee.[35] Under the proposals, the local conciliation committee, before attempting conciliation, would have to be of opinion that there was "reasonable cause" to believe that discrimination had occurred. This would be essentially an administrative finding neither appealable nor reviewable in the courts or before any other body. Undue judicialisation of the proceedings at this stage would obviously enable frivolous complainants and obdurate respondents to hold up the work of conciliation: at this stage it is the calibre of the committees (and, no doubt, the influence of the Board) which must provide the ultimate guarantee of the fair exercise of discretion. It is worth observing that although 108 of the 220 complaints investigated by committees in the first eighteen months of the Act's operation were not sustained, very few complainants have lodged objections against the committees' findings.[36]

Definitive fact-finding becomes necessary when conciliation fails. The Report proposes to meet this need by the establishment of an independent Race Relations Tribunal. Once there was an unresolved dispute the Board would assume primary responsibility for the proceedings, which it could then take to the Tribunal, selected from a panel of county court judges and others appointed by the Lord Chancellor.[37] Hearings would be in public, the parties would be entitled to legal representation and the Tribunal would have powers of subpoena and to take evidence on oath. It would be unfettered by ordinary rules of evidence, save that evidence obtained during the conciliation stage would be inadmissible.[38] The Tribunal would determine disputed questions of fact and law and, at the Board's request, could be asked to assess the complainant's pecuniary loss. The novel feature of the proposals is that it would be the Board and not the Tribunal which would then make the appropriate remedial order. This is justified on the ground that the Tribunal would not be fully cognisant of the administrative considerations relevant to the exercise of this discretion. The existence of the Tribunal will ensure high judicial standards of fact-finding; the power of the Board to make remedial orders will enable it to continue its attempts at conciliation when discussing the form the order might take with the respondent. Among the most radical proposals in the Report, which may set

[35] Paras. 144.1, 145.1, 152. The powers of subpoena given to Board members would be similar to those of the Parliamentary Commissioner.

[36] Information supplied by Race Relations Board; and see Report for 1966–67, paras. 11, 28.

[37] In employment cases the panel would include lay members with industrial experience but the Report does not wish to see issues referred to the Industrial Tribunal as such because this might cause unnecessary delays.

[38] S. 8 (2) of the present Act makes evidence of communications during the *investigation* stage inadmissible as well. This goes too far: see Report of the Race Relations Board for 1966–67, para. 88 (ix).

an example for the future development of labour law, is that the Board should have power to order an employer to hire, reinstate, promote, take into apprenticeship, offer the next vacancy to or afford specified facilities to the complainant.[39]

The Board's orders would not be self-enforcing: if an order or the terms of a conciliation agreement were not complied with, the Board would be able to institute contempt proceedings (except against the Crown) in the ordinary courts. Apart from this, the role of the courts would be limited to granting temporary injunctions[40] and to the exercise of judicial review on the ordinary grounds of want of jurisdiction, failure of natural justice and error of law disclosed by the record of the decision. Any other appeal would result in a loss of the advantages of entrusting these matters to the Board and Tribunal and would make the proceedings unduly complicated.[41] The Report does not propose to do away with existing causes of action at common law in respect of racial discrimination, but it suggests provisions for avoiding the duplication of damages.[42] It might also be thought desirable to prevent the overlapping of administrative remedies, particularly in the field of employment.[43] Fuller comment on these and other matters must now await the passage through Parliament of the new legislation.

2. *Immigration appeals*

Most disputes over the admission of aliens and Commonwealth citizens under the present system of control arise out of the assessment of an immigrant's intentions and the verification of his age and family relationships.[44] The Wilson Committee was left in little doubt, by the evidence presented to it, " that among the communities of Commonwealth immigrants in this country, and among people specially concerned with their welfare, there is a widespread belief that the Immigration Service deals with the claims of Commonwealth citizens seeking admission in an arbitrary and

[39] Para. 168.
[40] Paras. 158, 185.8.
[41] Para. 174. The proceedings will be shortened, and a source of political embarrassment removed, by the proposal that the Attorney-General should no longer have any role in the anti-discrimination machinery: paras. 14–16, 140. The Committee was not asked to examine the workings of s. 6 (incitement to racial hatred), which requires the Attorney-General's consent to prosecutions.
[42] Para. 179.
[43] This is not considered in the Report, but an example is the procedure available under s. 8 of the Terms and Conditions of Employment Act 1959 to representative unions and employers. Moreover, there might be an overlap in respect of racial dismissals if, in the future, " labour courts " are empowered to remedy unfair dismissals.
[44] In the case of aliens, the immigration officer's discretion is unfettered. In the case of Commonwealth citizens he does not have to act judicially or quasi-judicially but must let the " immigrant know what his immediate impression is so that the immigrant can disabuse him ": *Re H. (K.) (an Infant)* [1967] 2 Q.B. 617 and *R.* v. *Chief Immigration Officer, London Airport, ex p. Avtar Singh, The Times*, July 26, 1967.

prejudiced way." [45] Although it emphatically rejects the suggestions of impropriety, the Committee rightly stresses that the real heart of the matter is that justice is not *seen* to be done. Safeguards are essential "not only to check any possible abuse of executive power but also to give a private individual a sense of protection against oppression and injustice, and of confidence in his dealings with the administration." [46] For this reason it proposes a system of appeals in respect of (a) exclusion at a sea- or airport; (b) refusal of an entry certificate or visa; (c) refusal to withdraw a standing instruction for exclusion; (d) refusal to vary a condition of entry or unfavourable variation of a condition; (e) a proposal to deport or remove a person; (f) refusal to revoke a deportation order. The Committee rejected the suggestion that the use of entry certificates by Commonwealth citizens should be made compulsory since this would place them at a disadvantage in comparison with aliens for the great majority of whom there is no visa requirement. The obvious desirability of transferring as far as possible the decision on admission or exclusion to the point of departure from overseas leads the Committee to propose the encouragement by publicity and other means of the use of entry certificates.[47] Criticism by the Committee of a change in the Instructions to Immigration Officers in 1966, which had resulted in a devaluing of the entry certificate system, has already resulted in fresh instructions [48] which, in effect, guarantee the holder's admission subject to certain exceptions.

Two proposals by the Committee are not to be followed by the Government.[49] The Committee wanted security cases to be subject to the general appeals system, although it recognised that these cases would have to be heard in private by persons cleared for access to classified information. At the same time, it was prepared to exempt cases of a "political nature" from the proposed system, while leaving claims to political asylum within it.[50] The Home Secretary pointed out that it is not possible to distinguish "political" and "security" cases, and proposes to refer the latter to a special panel, leaving the power of final decision in his own hands. Claims to political asylum would apparently remain within the proposed system.

Secondly, the Government has rejected the Committee's proposal that the powers of the courts to recommend Commonwealth citizens for deportation should be withdrawn. This is unfortunate because of the difficulties inherent in a dual system: on the one

[45] Para. 84.
[46] Para. 85.
[47] Para. 72. At present only one Commonwealth citizen in five coming to the U.K. has an entry certificate.
[48] Cmnd. 3465 (November 1967), superseding para. 4 of Cmnd. 3064. In 1966, only 0.05 per cent. of entry certificate holders were refused leave to land.
[49] H.C.Deb., Vol. 754, cols. 457–458.
[50] Paras. 143–145.

hand there will be Commonwealth citizens recommended for deportation by the courts; on the other there will be aliens and, in addition, those Commonwealth citizens whom the Home Secretary (under new powers proposed since 1965 [51]) may deport without a recommendation. Presumably the former will not be able to make use of the new appeals system but the latter will be. Those dealt with by the one system might feel themselves less fairly dealt with than those subject to the other. Even more fundamental an objection is that the court's recommendation may only be acted upon after a long term of imprisonment when the convicted man's circumstances may have changed considerably.

It is disappointing that the Committee did not deal with some important matters in its Report. Although it heard evidence on the practices of disguised extradition (as in the *Soblen* case [52]) and voluntary deportation [53] these questions escape mention. Nor does it discuss the desirability of subjecting to a system of appeal the refusal of an employment voucher by the Ministry of Labour. Every year approximately 8,000 aliens are refused permits to work in the U.K.; in the first six months of 1967, over 5,000 applications for category A and B vouchers by Commonwealth citizens were refused. This is where the crux of immigration control lies. Within the limits imposed on them by policy decisions to limit the number of vouchers or the allocation to a particular country, Ministry of Labour officials clearly have to decide questions of fact and to apply rules. A great deal more needs to be known about how this discretion is exercised before it could be decided to subject the proceedings to a degree of judicialisation.

The Committee proposes a two-tier structure for the appeals machinery. This would consist of a central Immigration Appeal Tribunal and a number of subordinate adjudicators. The system, it is estimated, would have to deal with 15,000–20,000 appeals each year. This alone would make it impracticable for the ordinary courts to handle these matters. The procedure envisaged is that an appeal would be heard in the first instance by an adjudicator; there would be a hearing at which the appellant or his representative (as far as possible, provided with a written statement of the reasons for his exclusion) would be able to put up his case. With certain exceptions, an appeal from the adjudicator to the Tribunal would lie only with the leave of the adjudicator or the Tribunal. The appellate authorities would be brought within the scope of the Tribunals and Enquiries Act and so under the supervision of the Council on Tribunals. Apart from the ordinary grounds of

[51] Cmnd. 2739, para. 25; and see H.C.Deb., Vol. 754, cols. 459–460.
[52] See O'Higgins, "Disguised Extradition: The *Soblen* Case" (1964) 27 M.L.R. 521 (and the extensive bibliography therein).
[53] The practice of giving a convicted person the choice of voluntarily leaving the U.K. or being subjected to punishment for his crime here: O'Higgins, "Voluntary Deportation" [1968] Crim.L.R. 680. This practice has not ceased. (I am grateful to Dr. O'Higgins for this information.)

judicial review, no appeal in any other sense would lie from the Tribunal to the courts.[54]

8. *The limits of the law*

Gutteridge regarded it as a fundamental requirement of the "comparative method with a definite aim [*e.g.*, law reform] in view" that the investigator "must examine the operation of the rules in practice having regard to the legal and social environment in which each of the systems is called upon to function."[55] Both Reports have admirably fulfilled this injunction in regard to the adaptation of North American laws to the peculiarities of the legal systems of Britain, although some of the proposals will strike lawyers in this country as radical (*e.g.*, the specific enforcement of employment contracts). In these matters the new legislation might serve as pacemaker for the modernisation of other areas of the law. At the same time, it must be remembered that the terms of reference of each Committee virtually precluded it from considering the social environment in which each of the systems operates. Although the Street Report draws analogies between the industrially advanced states, such as Massachusetts, and Britain[56] none of its authors would deny the significant social differences between these countries. Nor can any precise analogy be drawn between the policies of immigration countries, such as the United States and Canada, and that of Britain. These differences have a decisive bearing on the role and limits of the law in each of the countries concerned. So, for example, the Street Report's discussion of the role of voluntary procedures in settling complaints of discrimination in employment is far from satisfactory because it does not take sufficient account of the way in which the boundaries of the law in industrial relations have been fixed historically, and how these boundaries are now being changed.[57] Its proposals for complaints of discrimination in employment to be dealt with by the same machinery as in other cases (although account would have to be taken of attempts to settle the matter through trade channels) are being disregarded and a compromise arrangement has been worked out with the T.U.C. and C.B.I. precisely because of the broader social issues involved.[58]

Devising fairer immigration procedures was a task for the lawyers. But, here too, the social limits of the new system will have

[54] The Tribunal would have a legally qualified President, and chairmen of divisions would also have to be so qualified. Adjudicators would be drawn from outside the public service at first (in some areas they might be local solicitors) and legal qualifications "would be an advantage": paras. 151–156.

[55] *Comparative Law*, 2nd ed. (1949), p. 9.

[56] Para. 94.2. There is an admirable summary of the experts' evaluation of the efficacy of legislation in the U.S.A. in paras 76–82. See too Report of the Race Relations Board for 1966–67, para. 65.

[57] *Cf.* para. 129.2; and see Hepple, *op. cit.* Chap. 9.

[58] Street Report, paras. 129, 149; Hepple, "Job Discrimination—Investigation, Conciliation, Arbitration," I.R.R. *Newsletter* (New Series), I, 10, p. 892.

to be recognised: indeed, it would be idle to think that immigrants will regard control as acceptable simply because of guaranteed due process. The very substance of control needs impartial investigation in the light of Britain's economic needs and international responsibilities.

The Reports are to be commended for recognising that legislation serves primarily as a basis for voluntary action to promote the absorption of minorities into the wider society. A proposal by the Wilson Committee that an independent organisation, with Government support, should be established to help immigrants who are in difficulties with immigration control, and, where necessary, to help them in presenting their cases, has already been implemented by the formation of the Joint Council for the Welfare of Immigrants.[59] The pressure for an extended Race Relations Act, given tremendous impetus by the Street Report, has resulted in the appearance, for the first time, of voluntary industrial procedures to deal with complaints of racial discrimination.[60] The new administrative structures themselves will cost the taxpayer about £500,000 in the case of immigration appeals and somewhat less in respect of anti-discrimination machinery. It seems a small price to pay for justice in race relations.

B. A. HEPPLE.

[59] See, too, the proposals by International Social Service of Great Britain in *Immigrants at London Airport and their Settlement in the Community* (June 1967).

[60] In particular an agreement between the Confederation of Shipbuilding & Engineering Unions and the Engineering Employers' Federation (July 1967). See Hattingh, *Race Relations and the Engineering Industry*. Engineering Employers' Federation (1967).

NOTES OF CASES

Hedley Byrne and the Eager Business Man

In *Hedley Byrne and Co. Ltd.* v. *Heller and Partners Ltd.*[1] the House of Lords finally exploded the doctrine that English law did not recognise the possibility of liability in the tort of negligence for the infliction of pecuniary loss by careless statement.[2] The decision itself, however, gave only general guidance to the sort of considerations that would justify a finding of a "special relationship" between the plaintiff and the defendant sufficient to give rise to a duty not to inflict economic loss by careless representations. The decision of Cairns J. in *W. B. Anderson & Sons Ltd. and Others* v. *Rhodes (Liverpool) Ltd. and Others*[3] is an important application of the general principles of *Hedley Byrne* to a familiar commercial situation resulting in the imposition of liability.

The action was brought by seven companies against Rhodes (Liverpool) Ltd. and two of their employees, Jones, the manager, and Reid, a salesman and buyer, as personal defendants. The plaintiffs claimed damages for losses incurred by the failure of a company called Taylors, which was not a party to the action, to pay for potatoes supplied by the plaintiffs to Taylors upon credit terms in reliance upon representations made by the defendants as to Taylors' credit. Taylors had enjoyed a brief existence trading in vegetables from March 1965 until the company was compulsorily wound up in July 1965, being unable to meets its obligations. Rhodes were a well-established concern and had themselves sold potatoes to Taylors, at first for cash and then on credit, although they had made no inquiries as to Taylors' standing. Taylors soon incurred large debts to Rhodes and the account was at least £2,500 overdue at all material times having regard to the accepted usages as regards payment in the trade. The defendants conceded that if the extent of this debt had been appreciated they could not have considered that Taylors were meeting their obligations in a satisfactory manner. It was accepted, however, that no one in Rhodes

[1] [1964] A.C. 465; [1963] 2 All E.R. 575 (H.L.).

[2] *Le Lievre* v. *Gould* [1893] 1 Q.B. 491; *Old Gates Estates Ltd.* v. *Toplis* [1939] 3 All E.R. 209; *Candler* v. *Crane, Christmas & Co.* [1951] 2 K.B. 164; *cf. Cann* v. *Willson* (1888) 39 Ch.D. 39.

[3] [1967] 2 All E.R. 850, at Liverpool Assizes. *Hedley Byrne* was restrictively distinguished in the New Zealand case of *Jones* v. *Still* [1965] N.Z.L.R. 1071 but the principle was applied to impose liability on an estate agent for the negligent misstatement of the operating costs of a block of flats to a prospective purchaser in the Canadian case of *Dodds & Dodds* v. *Millman* (1964) 45 D.L.R. (2d) 472, and on a surgeon for the negligent misstatement of an operational risk to a patient in the New Zealand case of *Smith* v. *Auckland Hospital Board* [1965] N.Z.L.R. 191, although in this case the damage was personal injury.

did appreciate the state of the account with Taylors and the judge attributed this failure to the personal negligence of the defendant Jones and the company's book-keeper, who was not joined in the action.

After a while, Rhodes agreed to act as buying agents for Taylors, receiving a commission from them in respect of purchases made on their behalf. The claims of the plaintiff companies arose out of such transactions whereby they had supplied potatoes to Taylors. Apart from one instance, the contracts were negotiated by the defendant Reid. In all cases apart from one, the representative of the plaintiff company concerned had at first thought that Rhodes were purchasing as principals but had agreed to supply the goods to Taylors after Reid or Jones had stated that Taylors were good payers. Upon Taylors failing to pay, these claims were brought against the defendants on the basis that the statements were untrue and were made negligently in breach of the duty to the plaintiffs that arose having regard to the special relationship between the plaintiffs and the defendants. Cairns J. accepted this argument and allowed four of the claims against Rhodes, dismissing the remaining three as well as all claims against the personal defendants.

The special relationship

The first major point decided by the case is that a special relationship giving rise to a duty of care may arise informally between ordinary business men engaged in a normal commercial transaction. There have been suggestions in the past that a duty to avoid inflicting financial loss by careless statement might only arise in the case of " accountants, surveyors, valuers and analysts, whose profession and occupation it is to examine books, accounts, and other things, and to make reports on which other people—other than their clients—rely in the ordinary course of business." [4] Cairns J. was not prepared to accept this limitation and stressed the following factors: " Rhodes' opinion was clearly asked ' in a business connection,' to use Lord Reid's phrase. The advice was not ' casual and perfunctory,' and there was ' some direct dealing ' between the parties: these are expressions used by Lord Morris. I think that it can be said that the plaintiffs could reasonably rely on the judgment and skill of Rhodes. Here I am quoting Lord

[4] *Candler* v. *Crane, Christmas & Co.* [1951] 2 K.B., *per* Denning L.J. in his famous dissent at p. 179. This passage was approved in *Hedley Byrne* [1963] 2 All E.R., *per* Lord Devlin at p. 611 and Lord Pearce at p. 617; see also Lord Morris at p. 599, Lord Hodson at p. 598 and Lord Pearce at p. 616. In *Jones* v. *Still* [1966] N.Z.L.R. 1071, Wilson J. held, in the Supreme Court, that *Hedley Byrne* only applied where the defendant had a " special skill " and refused to accept that an ordinary agent selling a house on behalf of his principal could be liable to a purchaser for negligently misstating his principal's intention to include certain property in the sale, this not being apparent in the written offer.

Hodson, and I think there was an element of which Lord Devlin speaks—'a relationship equivalent to contract. . . .' Finally, to use a test suggested by Lord Pearce; the representation here concerned a business transaction whose nature made clear the gravity of the inquiry and the importance and influence attached to the answers. I say that this test was satisfied, because it is clear that none of the plaintiffs would have been willing to sell to Taylors unless they had been assured that Taylors were 'all right,' or something to the same effect."[5] The facts were clearly as favourable as they could be to an extension of the duty beyond professional advisers. To identify them more specifically there was (1) a serious business inquiry (2) concerning an immediate identified transaction[6] (3) in which the defendants had a direct financial interest (4) about which the defendants, who were respected traders, were in a position to know more than the plaintiffs,[7] and (5) where it was obvious to all concerned that the answers given by the defendants were going to be relied on by the plaintiffs as a major inducement in completing the transaction. In so far as the defendants clearly wished to bring about that transaction it would not have taken a great deal of judicial valour to have spelt out a collateral contract from the situation quite apart from relying on *Hedley Byrne*.[8]

The nature of the duty

Apart from the finding that these facts constituted a sufficient special relationship to give rise to a duty of care, the judgment contains a number of interesting implications concerning the nature of this duty. The most significant of these is that the case proceeds on the assumption that liability under *Hedley Byrne* can only arise in respect of representations. The initial acts of carelessness consisted in the failure of Jones and the book-keeper to keep their accounts up to date so that the state of Taylors' indebtedness remained hidden.[9] Although this failure put Rhodes themselves at risk of loss it could hardly amount to a breach of duty to the

[5] [1967] 2 All E.R. at p. 862.

[6] See Honore, 8 J.S.P.T.L.(N.S.) at pp. 288–289. *Cf.* Lord Devlin [1963] 2 All E.R. at p. 611.

[7] Compare the importance which the courts attach to this factor when considering whether a statement was intended as a term in a contract: *Oscar Chess Ltd.* v. *Williams* [1957] 1 W.L.R. 370.

[8] The consideration for the defendants' undertaking being the conclusion by the plaintiffs of the contracts with Taylors, *e.g.*, as in *Shanklin Pier Ltd.* v. *Detel Products Ltd.* [1951] 2 K.B. 854. Even if this was construed as a contract of guarantee, written evidence would not have been required under s. 4 of the Statute of Frauds 1677 on the principles laid down in *Couturier* v. *Hastie* (1852) 8 Ex. 40 and *Sutton* v. *Grey* [1894] 1 Q.B. 285. One of the plaintiffs, Andersons, did in fact claim on an express guarantee but this claim was dismissed by the judge, who gave no reasons: see [1967] 2 All E.R. at p. 854 and 856.

[9] [1967] 2 All E.R. at p. 854.

plaintiffs.[10] The duty to the plaintiffs arose because the defendants undertook to answer their inquiries concerning Taylors. The breach consisted, not in the failure to keep their own accounts in order, but in giving an apparently authoritative answer to the plaintiffs, knowing it would be accepted as such, when they ought to have known that they were not in a position to give such an answer. This is the true meaning of negligent misstatement. The remarks of Pearson L.J., that a banker " . . . is not expected . . . to expend time and trouble in searching records, studying documents, weighing and comparing the favourable and unfavourable features and producing a well-balanced and well-worded report . . . ," [11] are, with respect, something of a red herring. The negligence does not consist in a failure to investigate, but in giving the plaintiff the impression that one has. The point is made very clearly by Cairns J.: " There was no necessity . . . to read many documents or to weigh and consider favourable or unfavourable factors, or at least there would have been no such necessity if Rhodes had kept their accounts in a reasonably careful manner, as I consider *the inquirers were entitled to assume that they did.*" [12] The defendants were liable because they gave advice when they ought, as reasonable business men, to have realised that the state of their accounts did not permit them to do so accurately and not simply because they failed to keep their own accounts properly.

The judge found that no express representations as to the credit of Taylors had been made to two of the plaintiff companies.[13] Credit had been extended to Taylors by these companies because they had relied on the fact that Rhodes themselves had dealt with them or on the fact that Rhodes had introduced them.[14] A much wider principle of liability was urged on their behalf. This argument was summarised by Cairns J. as follows: ". . . the defendants knew that the plaintiffs would be influenced by Rhodes' own good reputation in the market to give credit to Taylors, and that the

10 The common law has always been reluctant to accept that failure to safeguard one's own interests should involve liability to others: *Farquharson Bros.* v. *King* [1902] A.C., *per* Lord Macnaghten at pp. 335–338.

11 *Hedley Byrne* [1961] 3 All E.R. at p. 902, in the C.A. This reflects a natural anxiety to avoid imposing undue obligations on those giving gratuitous advice and seems to have been approved in the H.L., together with the assertion that in such a situation the only duty may be one to answer honestly: Lord Reid at p. 584, Lord Morris at pp. 594–595, Lord Hodson at p. 600; but see Lord Pearce at p. 618 and Lord Devlin at pp. 610–618. This would, in effect, leave the law as stated in *Derry* v. *Peek* (1889) 14 App.Cas. 337, and is basically inconsistent with a duty not to be negligent: see note 25, *infra*. It is submitted that, if the law is stated as a duty not negligently to mislead, this apparent difficulty disappears. The defendant is not liable for failing to search records, etc., and to give a full professional service gratuitously. He is liable because he makes apparently authoritative statements when he knows or ought to know that he is not in a position to give reliable advice: see Lord Reid at p. 588. *Cf.* Lord Devlin at pp. 602 and 610.

12 [1967] 2 All E.R. at p. 862, emphasis added.

13 Andersons and Skenes, *ibid.* at p. 856.

14 *Ibid.* at p. 855.

defendants, therefore, owed a duty to the plaintiffs to take care to learn about Taylors' reliability and to inform the plaintiffs of their findings." [15] The argument was based directly on *Donoghue* v. *Stevenson* [16] rather than *Hedley Byrne* and Cairns J. had no difficulty in rejecting it on these grounds. "If the doctrine of *Donoghue* v. *Stevenson* does not directly impose any duty on the maker of the representation, I do not see how it can possibly impose a duty on a trader, apart from any representation he may make, to inquire about another trader's credit and give information about it to persons who may deal with that other trader." [17]

A duty so stated in general terms is clearly far too wide to gain general acceptance. To suggest that a commercial man must concern himself with the reactions of other traders as a result of inferences drawn by them from his conduct runs counter to the basic beliefs of competitive enterprise. On the other hand, on the facts of the situation in *Anderson* v. *Rhodes*, it is not so obvious why the conduct of the defendants in introducing Taylors should not have given rise to an implied representation as to the credit of their principals. The object of a trader seeking a business introduction is to gain acceptance among the friends of the person making the introduction. If the introducer can foresee that his friends will place reliance on his implicit recommendation, it does not seem to be setting an unduly idealistic standard of commercial morality to say that he should at least take reasonable care to ensure that the trust of his friends is not misplaced. The report does not indicate why Taylors were prepared to employ Rhodes as buying agents, but it seems not unlikely that one reason was the ease with which they could obtain credit. This was the actual, and apparently the intended, result of employing them. All the plaintiffs were left with the impression, whether conveyed by words or conduct, that Taylors were reliable. The distinction between the very informal words that were held sufficient to import liability in the case of the successful plaintiffs and the conduct that conveyed the same impression in the case of the unsuccessful plaintiffs does not seem sufficiently clear to justify the difference in legal result.[18] Representations can be made by implication as well as expressly and by conduct as well as by words,[19] and it is to be hoped that, in their natural anxiety not to expose business men to unreasonably extensive liability, future courts will not unduly circumscribe the

[15] *Ibid.* at p. 853.
[16] [1932] A.C. 562.
[17] [1967] 2 All E.R. at p. 853.
[18] In the case of Andersons, the claim was dismissed on the finding that the plaintiff's representative understood Reid to mean no more than "I have been dealing with Taylors and nobody has told me to stop." As the judge said, this was true. But the implication as to their credit was conveyed as clearly as if expressly stated.
[19] Even for the purposes of the criminal law: *Barnard* (1837) 7 Car. & P. 784.

principles of *Hedley Byrne* by confining it narrowly to express representations.[20]

Advantages of an action in negligence

Anderson v. *Rhodes* contains two technical, but nevertheless practically very important, points demonstrating still further the advantages of an action in negligence over an action in deceit.

Even if the plaintiffs had been able to prove fraud, the present action would have fallen within Lord Tenterden's Act providing that "No action shall be brought whereby to charge any person . . ." upon the basis of a representation as to the credit of a third person ". . . unless such representation or assurance be made in writing, signed by the party to be charged therewith."[21] The section is not in terms limited to actions based on fraud, but Cairns J. held, on the authority of *Banbury* v. *Bank of Montreal*,[22] that it did not apply to an action based on negligent breach of duty.

The second point was not elaborated in the judgment. It raises the question of the nature of the liability of an employer, whether a company or an individual, in respect of negligent misstatement by his servants or agents. Is this a true vicarious liability for the independent tort of a servant or agent committed in the course of his employment or scope of authority or is it a liability imposed directly on the employer for breach of his own personal duty by the acts of his delegates? The distinction is important as a result of *Armstrong* v. *Strain*,[23] which suggests that liability in deceit is vicarious. The result of this is that a principal can only be held liable for the fraud of his agents if all the elements of personal liability can be shown to exist in one of those people for whom he is vicariously liable. It is not sufficient to prove that one agent innocently made a false statement and that another agent, or even the principal himself, was aware of the facts which rendered the statement false (unless the principal had knowingly

[20] A number of decisions have demonstrated a reluctance to accept the wider implications of *Hedley Byrne* in relation to the protection of pure economic interests generally: *The World Harmony* [1965] 2 All E.R. 139: *Weller & Co.* v. *Foot & Mouth Disease Research Institute* [1965] 3 All E.R. 560; *Margarine Union G.m.b.H.* v. *Cambay Prince S.S. Co. Ltd.* [1967] 3 All E.R. 775. *Rondel* v. *Worsley* [1967] 3 All E.R. 993 turned on wider issues of policy. The problem is fully discussed by Atiyah (1967) 83 L.Q.R. 248.

[21] The Statute of Frauds Amendment Act 1828, s. 6. As signature by an agent is not sufficient it would seem that a company cannot be made liable for a fraudulent misrepresentation as to the credit of a third person: *Hirst* v. *West Riding Union Banking Co. Ltd.* [1901] 2 K.B. 560 unless signed by one of the higher-placed officials directing the "mind and will" of the company; *Lennard's Carrying Co.* v. *Asiatic Petroleum* [1915] A.C. 705; and see Gower, *Company Law* (2nd ed.), p. 140.

[22] [1918] A.C. 626. In this case the action was based on breach of a contractual duty. Cairns J.'s ruling that liability depended upon the making of the representations makes it difficult to reconcile his decision, that the Act did not apply, with certain dicta in *Banbury's* case, *e.g.*, Lord Finlay at p. 640: "s. 6 appears to me . . . to be confined to actions brought upon misrepresentations as such, and not to bar redress for failure to perform any contractual or other duty."

[23] [1952] 1 K.B. 282 (C.A.).

authorised the making of the false statement). Cairns J. dismissed all the claims against the individual defendants, Reid and Jones. The misleading statements on which the successful plaintiffs relied had been made to them by the buyer, Reid. The judge absolved him from personal responsibility, however, because ". . . he was entitled to assume that if Taylors were not meeting their liabilities he would have been warned of this by Jones. . . ." [24]

Although Jones had been careless, because he ". . . ought to have known that inquiries about Taylors' conduct were likely to be made of Reid, and he ought to have informed himself and thereafter informed Reid of the state of the accounts . . . ," [24] he was not personally liable to the plaintiffs for statements made by Reid because " It was not as his servant or agent but as Rhodes' that Reid was acting, and there is no evidence of any instructions from Jones to Reid such as might have made him liable as the actual author of the representations." [24] The dismissal of the claims against Jones follows from the judge's ruling that liability turned on the making of representations. This being so, only those defendants who had assumed responsibility for the representations could be held liable. The mere fact that Jones ought to have foreseen Reid making them did not involve Jones personally in such an undertaking of responsibility.[25] Rhodes, on the other hand, were liable for Reid's statements, as, even if not expressly authorised, they were made in the course of his employment with them.

The elements of the actionable tort were distributed in different departments of Rhodes' organisation and the liability seems to have been a composite or organisational liability rather than a simple vicarious one. The acts, rather than the independent torts, of each servant were attributed to the company and together they amounted to breach of a personal duty owed by the company to the plaintiffs.[26] The result is that a company may be liable if one

[24] [1967] 2 All E.R. at p. 856.

[25] *Ibid.* There is an implicit suggestion that Jones would have been liable if he had had actual knowledge that Reid was making the statements. This seems inconsistent with the ruling that reasonable foresight was not enough. In negligence the man who ought to have known is equated with the man who actually knows: see Lord Reid [1963] 2 All E.R. at p. 588. This suggestion, therefore, seems *per incuriam* if liability depends upon an assumption of responsibility, for knowledge, actual or constructive, is only evidence of such an assumption. Jones had himself made representations to one of the plaintiffs, Pollards. In this case, however, the judge found that the representative of the plaintiff company had only expected an honest answer, and he had obtained this, and the claim was therefore dismissed. No reasons were given. If this limited expectation had been communicated to Jones, it would presumably have had the effect of qualifying his undertaking. If not communicated, it would presumably amount to *volenti*.

[26] The duty may be compared with the duty of an employer in respect of a safe system of work: *Wilsons & Clyde Coal Co. Ltd.* v. *English* [1938] A.C. 57. It seems that a commercial enterprise is under a duty to establish a " safe system of information " if it elects to give advice in circumstances giving rise to a special relationship.

of its servants makes a false or misleading statement in the course of his employment, even though he has no reason to doubt its accuracy, if some other servant, who is responsible for the matters concerned in the statement, has negligently failed to inform the maker about those matters.

This decision is a striking illustration of the blurring of the distinction between liability in contract and tort, with a consequent readjustment of the business risks involved in ordinary commercial transactions, that is implicit in *Hedley Byrne*. In effect, the defendants found themselves giving a guarantee, admittedly limited rather than absolute, of their principal's credit but with no corresponding increase in their remuneration for taking on this additional obligation. The plaintiffs obtained the benefit of an effective insurance of their trade profits, for they recovered the full contract price of the goods sold to Taylors,[17] without the necessity of paying a premium. Such consequences will not go unremarked in the world of commerce and it will be interesting to see how the new morality of accountability for economic negligence survives in the hard-headed world of competitive trade.

MICHAEL DEAN.

PUBLIC POLICY AND THE IMMUNITY OF ADVOCATES

IN the course of its passage from Master Lawrence, who ordered that the plaintiff's statement of claim be struck out, to the House of Lords, nine judgments have been delivered in the case of *Rondel* v. *Worsley*.[1] Every judge has held that on the ground of public policy a barrister is immune from an action for negligence at the suit of his client for his conduct of a case in court, and most said that the immunity covers the preliminary work on the conduct and management of a case such as the drawing of pleadings. The judgments of the House of Lords are much fuller, better reasoned and more persuasive than those of the Court of Appeal [2] but some commentators have remained unconvinced. *The Times* [3] and the *Solicitors' Journal* [4] condemned the decision, the *New Law Journal* was generally critical.[5] On the other hand the Chairman of the Bar Council said that the Bar would regard the decision as satisfactory [6] and the *Law Society Gazette* said, with a certain self-interest in view of the new divorce hearings in the county court,[7]

[17] It is doubtful whether loss of expected profits, as opposed to loss of existing assets, may be recovered in *deceit*, as such damages are more characteristic of contract than tort. Mayne and McGregor, *Damages*, 12th ed., § 955 *et seq.* *Cf.* Street, *Tort*, 3rd ed., at p. 337. Cairns J. awarded the plaintiff wholesalers the price at which they sold, thereby including their profit, rather than the cost to themselves, without argument.

[1] [1967] 3 W.L.R. 1666; [1967] 3 All E.R. 993.

[2] [1966] 3 All E.R. 657.

[3] November 23, 1967, p. 11, "An Impolitic Immunity."

[4] Vol. 111, No. 48, p. 917, "as a matter of principle and practice the immunity cannot be justified."

[5] Vol. 117, p. 1255.

[6] *The Times*, November 23, 1967, p. 1. "No moaning at the Bar," commented the *New Law Journal*, *ibid.* p. 1255.

[7] Matrimonial Causes Act 1967, ss. 1, 2.

that " from the viewpoint of the solicitor, the judgments may be considered eminently satisfactory." [8]

Time may show that both the criticism and the approval are premature. Two of the five Law Lords held that the immunity does not extend to " pure paper-work "—matters unconnected with cases in court—and Lord Pearson, though doubtful, was inclined to agree. Lord Pearce disagreed, as he felt that in no case should counsel be tempted to pick and choose his clients.[9]

Lord Denning and Danckwerts L.J. in the Court of Appeal had said that counsel doing routine drafting work which might never reach court must have the immunity, the unconvincing reason being given that counsel could not do his best work if he were to be worried by the possibility of being sued for negligence.[10] No judge in the Lords agreed that such an immunity existed; indeed two spoke widely in finding a liability on counsel when he deals with " pure paper-work." Lord Reid mentioned " extensive fields of advisory work or work in drafting or revising documents " where immunity did not operate [11] and Lord Upjohn listed the " drafting of wills, settlements, conveyance [*sic*], real property contracts, commercial contracts, charter parties or giving advice generally " [12] and suggested that the immunity might commence at " letter before action." [13] One cannot imagine any drafting or advice given by counsel on which litigation might not eventually be based, even though none was contemplated when it was given. If counsel can be sued if it is negligently given it is possible that on balance *Rondel's* case may have enlarged the liability of barristers by fixing a liability where previously there was thought to be none; some barristers are largely draftsmen rather than advocates.

Four of the Lords said that the immunity from suit extends to a solicitor when he is carrying out work in litigation which would have been carried out by counsel if counsel had been engaged on the case; Lord Pearson left the point open.[14] The prospect that solicitors with no experience of drawing pleadings will be tempted to draw their own in the knowledge that they are not liable in negligence for faulty drafting is alarming. A client ought to have a remedy in such a case; a limited one may be afforded by the provisions of Order 62, rule 8, Rules of the Supreme Court 1965 under which, in proceedings in the Supreme Court only,[15] a court may

[8] Vol. 64, No. 12, p. 654.
[9] Lord Reid, p. 1677; Lord Upjohn, p. 1728; Lord Pearson, p. 1730; Lord Pearce, p. 1715; Lord Morris of Borth-y-Gest expressed no view.
[10] [1966] 3 All E.R. at pp. 667, 672.
[11] p. 1677.
[12] p. 1728. Lord Upjohn said that even then a barrister would only be liable if his error was " gross negligence by some really elementary blunder " (p. 1724). No other judge made the point.
[13] *Ibid.*
[14] Lord Reid, p. 1678; Lord Morris, p. 1687; Lord Pearce, p. 1706; Lord Upjohn, p. 1723; Lord Pearson, p. 1730.
[15] *Davis* v. *Coles* (1912) 182 L.T.J. 577, *Cordery on Solicitors* (5th ed.), p. 162.

order a solicitor to pay personally costs which have been incurred improperly or without reasonable cause or wasted by undue delay or by any other misconduct or default of the solicitor responsible.[16] It is suggested that this remedy is outside the effect of *Rondel* v. *Worsley* because it arises by statute out of the fact that a solicitor is an officer of the Supreme Court and subject to its jurisdiction.[17]

Rondel v. *Worsley* is a public policy decision. Lawton J. at first instance recognised that many will say that " at some time between the sixteenth and eighteenth centuries barristers, with the connivance of the judges, built for themselves an ivory tower and have lived in it ever since at the expense of their clients." [18] In the Lords, Lord Upjohn said that he doubted whether anyone who had not judicial experience could appreciate the great extent to which the courts relied on the integrity and fairness of counsel in presenting the case; the removal of the immunity could well mean that the court could not in future put such a trust in counsel.[19] These are views which one tends to accept utterly or reject utterly, the governing factor in one's choice probably being more emotional than rational. One powerful observation made by the Lords may however be added.[20] Lord Pearce pointed out that all participants in the trial of an action in court have an immunity: the plaintiff with a flimsy case cannot be sued for all the loss caused to the other party who successfully defends it,[21] the Press cannot be sued if they accurately report untruthful allegations,[22] the judge cannot be sued if he is corrupt,[23] the jurors cannot be sued if they are perverse and the witnesses cannot be sued if they give false and malicious evidence.[24] Should counsel alone amongst these be " liable for his failure in the judicial process " ? [25] Lord Upjohn denied that the immunity of advocates was any new ground of public policy, it was part and parcel of the long-established general policy of immunity for judges, witnesses and counsel in the public interest.[26]

Problems remain still. What is " a court ? " [27] Is the Industrial Court, hearing a claim under the Terms and Conditions of Employment Act 1959,[28] or is an Industrial Tribunal, hearing a case under

[16] " Default " means or includes negligence, such as a failure to note one's client's new address so that correspondence is wrongly sent and judgment is given in default of a reply: *D.* v. *D.* [1963] 1 All E.R. 602.
[17] Solicitors Act 1957, s. 60 (1), *Myers* v. *Elman* [1940] A.C. 282 at p. 302, *per* Lord Atkin.
[18] [1966] 1 All E.R. 467, at p. 479. [19] pp. 1720–1721.
[20] Lord Denning made the point too in the court of Appeal, p. 665.
[21] p. 1713.
[22] p. 1710. Law of Libel Amendment Act 1888, s. 3; Defamation Act 1952, s. 8.
[23] p. 1710. *Scott* v. *Stansfield* (1868) L.R. 3 Ex. 220.
[24] p. 1709. *Hargreaves* v. *Bretherton* [1959] 1 Q.B. 45.
[25] To the same effect, Lord Reid, p. 1675; Lord Upjohn, p. 1722.
[26] p. 1722.
[27] See (1967) 30 M.L.R. 194 at pp. 196–197, reviewing the Court of Appeal decision.
[28] Appearance may be made by counsel or solicitor, rule 8, Industrial Court (Procedure) Rules 1920 (S.R. & O. 1924 No. 554).

the Redundancy Payments Act 1965,[29] a "court" in which the immunity applies? A solicitor is still liable in contract to his client for matters outside the scope of his new-found immunity as an advocate; if he fails to bring a witness to court he is liable, but if he himself conducts the case and brings the witness but culpably fails to call him, possibly he is not liable.[30] If a solicitor himself conducts in court a case which is far too difficult for him so that it is not properly presented he is not liable. If a solicitor fails to appear at court when he has not retained counsel he is liable in contract; if counsel fails to appear counsel is not liable for he has made no contract [31] and the solicitor is not liable if he attends court for he is not in breach of contract.

Lord Davey once said that the right to light has a ragged edge to it.[32] So still has the immunity of advocates, but it will be surprising if Parliament sees fit to alter the position as now stated by the Law Lords.

H. W. Wilkinson.

Conceptualism Triumphant in the Court of Appeal

The judgments of the Court of Appeal in *United Dominions Trust (Commercial) Ltd.* v. *Eagle Aircraft Services Ltd.*[1] are a dismal illustration of the extent to which English legal method is still dominated by conceptual techniques. What is particularly depressing is that the kind of problem which arose in this case has been extensively discussed by American legal writers in an attempt to demonstrate the fallacies of conceptual thinking, and that over thirty years ago American courts were dealing with this sort of problem with a sophistication which we seem to be unable to match today.

The case involved the liability of a party to a hire-purchase "recourse agreement." The defendants, Eagle, owned a Viking aircraft which they wanted to sell. The aircraft was disposed of by means of a sale to the plaintiffs, U.D.T., a finance company, followed by a hire-purchase agreement between U.D.T. and a third party (Orion Airways Ltd.), and the recourse agreement in question, between U.D.T. and Eagle, whereby Eagle undertook to repurchase the aircraft in certain circumstances. The full terms of the agreement are not given in the report, but the crucial clause provided that if for any reason the hire-purchase agreement was terminated before the whole amount payable thereunder had been paid, Eagle would "when called upon to do so" forthwith repurchase the

[29] A party may be represented by counsel or solicitor, rule 7, the Industrial Tribunals (Employment and Compensation) (England and Wales) Regulations 1965 (S.I. 1965 No. 2018).
[30] Lord Pearson found this a hard problem to answer, p. 1781.
[31] Lord Upjohn, p. 1722.
[32] *Colls* v. *Home and Colonial Stores* [1904] A.C. 179 at p. 200.
[1] [1968] 1 All E.R. 104; [1968] 1 W.L.R. 74.

aircraft from U.D.T. at a price equal to the amount then outstanding on the hire-purchase agreement. There were a number of provisos to this agreement. Proviso (a) required the plaintiffs to assign to Eagle its rights against the hirers if called upon to do so after Eagle had repurchased the aircraft. Proviso (b) is not given in the report. Proviso (c) required U.D.T. to keep the aircraft insured, and proviso (d) stated that U.D.T. would notify Eagle within seven days of any default made by the hirers in payment of the hire rentals. The hirers defaulted on the instalment due in August 1960, but U.D.T. did not inform Eagle of this until October, whereupon Eagle repudiated all further liability on the ground of breach of proviso (d). In December 1960 U.D.T. terminated the hire-purchase agreement without informing Eagle. U.D.T. had some difficulty in locating the aircraft but it was eventually traced into the hands of a company called Airwork Services Ltd., who were servicing it, and who claimed a lien on it for a substantial sum. U.D.T. paid off the lien and had further work done to the aircraft to make it airworthy without informing Eagle. Eventually they called on Eagle to repurchase the aircraft under the recourse agreement in May 1961, five months after termination of the hire-purchase agreement. Eagle refused, and when sued, took two points: first, breach of proviso (d); and secondly, that it was an implied term of the recourse agreement that they could only be called upon to repurchase within a reasonable time, and that such a time had expired by May 1961. The trial judge (Widgery J.) rejected these arguments, and held Eagle liable under the recourse agreement, but he also held that U.D.T. were liable in damages (to be assessed) for breach of proviso (d). The Court of Appeal allowed the appeal, holding that failure to call on Eagle to repurchase within a reasonable time was fatal to U.D.T.'s claim. The court expressed no final view on the effect of the breach of proviso (d) but inclined to think, by a two to one majority, that Eagle were also discharged by breach of this proviso.

Now if for a moment we put on one side our learning about legal classifications and concepts—" options," " unilateral contracts," " conditions precedent " and so forth—it is clear that the real point at issue was simply this: was Eagle's obligation to repurchase the aircraft " conditional " (in the strictest and most accurate sense of the word) (a) on compliance by U.D.T. with proviso (d); or (b) on U.D.T. calling on Eagle to repurchase within a reasonable time? This issue gives rise to two further questions: (1) had the parties *expressly agreed* that Eagle's obligation to repurchase should be conditional on events (a) or (b), always assuming that there was no overriding policy reason for refusing to give effect to the parties' express agreement? (2) If not, should Eagle's obligation be treated as conditional by construction or implication of law?

The answer to question 1 was plainly " No." The parties had

not expressly agreed that Eagle's obligation to repurchase should be conditional upon anything except on their being "called upon to do so." It was expressly agreed by proviso (d) that notice of default should be given, but it was not expressly agreed that this should be a condition of Eagle's obligation. And the second possible condition—that notice to repurchase must be given within a reasonable time—was not express at all, let alone an express condition of Eagle's obligation.

Since, then, Eagle's obligation to repurchase was not expressly made conditional on event (a) or (b), the question was whether it should have been treated as conditional by construction or implication of law. This was, of course, a policy question, pure and simple. Was it fair, just or reasonable, to treat it as conditional? In answering this question a crucial point was the nature of the transaction. Now the transaction here looked like an "option," and there is no doubt that in an ordinary option a stipulation as to the time during which the option must be exercised is a condition which must be strictly complied with. But, as Corbin points out,[3] the reason for this is that in most cases the exercise of the option within the stipulated time is *expressly* made a condition of the option. In all the option cases cited by the court in the instant case,[3] the option was expressly made conditional on its being exercised within a specified time, or on some other event, but the court does not appear to have been referred to other authorities in which no time was fixed for the exercise of the option, and in which the court declined to read in an implication that the option must be exercised within a reasonable time.[4] These cases involved options to tenants, and admittedly it is much easier to read in an implication that such an option must be exercised while the tenant is in occupation rather than that it must be exercised within a reasonable time. It is not therefore suggested that these cases should have governed the present case. But they do at least show that there may be a great deal of difference between an express time limit and an implied time limit.

But even if an implied time limit could often properly and fairly be treated as a condition of an option, this is because of the nature of most options. Generally, the right to an option is purchased for a small consideration, and is given for a limited time, so that once the time has expired the option holder has in fact received the full consideration which he purchased.[5] But the contract in the present case was *not* an ordinary option contract; its fundamental purpose was to guarantee the performance of the

[2] *Contracts*, Vol. 1A, § 278.
[3] *Weston* v. *Collins* (1865) 12 L.T. 4; *Finch* v. *Underwood* (1876) 2 Ch.D. 310; *Hare* v. *Nicoll* [1966] 2 Q.B. 130; *West Country Cleaners* v. *Saly* [1966] 3 All E.R. 210.
[4] *Hersey* v. *Giblett* (1854) 18 Beav. 174; *Moss* v. *Barton* (1866) L.R. 1 Eq. 474; *Buckland* v. *Papillon* (1867) L.R. 2 Ch. 67; *Rider* v. *Ford* [1923] 1 Ch. 541.
[5] Corbin, *loc. cit.*

hire-purchase agreement, as is manifest from the circumstances. To all intents and purposes it was a contract of suretyship or indemnity. The real consideration for the option was not some small or nominal sum, but the very fact that U.D.T. had originally bought the aircraft from Eagle for £20,000. The contract was what American lawyers would call an " aleatory contract," *i.e.*, a contract in which one or more promises are conditional on the happening of some fortuitous event.[6] Now it is well recognised by American lawyers that stipulations as to time are not to be treated as conditions in an aleatory contract, unless they are expressly made so.[7] The reason for this is that in such contracts the performance of the promises made by the parties are not intended to be exchanged as agreed equivalents. For example, the premium in an insurance contract is not intended to be exchanged as the equivalent of the policy moneys. For this reason it would be wrong to treat an aleatory promise as conditional on the performance of the other party's promise, unless the contract expressly so provides.[8] *A fortiori*, the failure to perform a promise in due time should not discharge an aleatory promise.

The American approach to such a problem is well illustrated by the decision of a Federal Court of Appeals in *Southern Surety Co.* v. *Macmillan Co.*[9] which raised a problem almost identical with that involved in the breach of proviso (d) in our case. The defendants in the American case guaranteed performance of a contract entered into between the plaintiffs and a third party, whereby the third party was to act as distributor for the plaintiffs' books. The third party was required to render periodical accounts and stock reports to the plaintiffs, and in the event of any default the plaintiffs were required to notify the guarantor within sixty days. Defaults occurred but owing to fraud on the part of the third party's servants, they were concealed from the plaintiffs, so that notice was given long after the sixty days had expired. The court asked itself two questions: first, had the requirement of notice been made an express condition of the contract? Secondly, if this requirement was not an express condition, should it be treated as a condition by construction of law, or merely as a promise, breach of which might but need not discharge the guarantor? After careful examination of the contract the court concluded that the term was not a condition but a mere promise, and that since the defendant's promise was aleatory, breach by the plaintiffs of their promise sounded in damages only.[10]

[6] Restatement, *Contracts*, § 291; Corbin, *Contracts*, Vol. 3A, § 728 *et seq.*
[7] Corbin, Vol. 3A, §§ 726, 738.
[8] Restatement, *Contracts*, § 287.
[9] 58 F. 2d. 541 (1932).
[10] English courts have adopted a similar approach in dealing with insurance contracts, in which terms requiring notice of loss within a specified time are not treated as conditions unless the contract so provides by very clear provisions: see *MacGillivray on Insurance Law*, 5th. ed., Vol. 2, § 1718 *et seq.*

Compare this approach with that of the Court of Appeal in the present case. The reasons given by the members of the court for their decision are almost entirely conceptual. The agreement to repurchase was not an ordinary bilateral contract but a unilateral contract. It was an option and like all options must be exercised strictly in the time allowed. Since the obligation was unilateral it followed that it only became binding when the event specified (or implied) in the promise occurred precisely as stipulated. Such events were therefore " conditions precedent " and there was no room for any inquiry as to whether non-occurrence of the event had prejudiced the promisor, or could be remedied by a counterclaim for damages. It need hardly be said that this form of reasoning—like all conceptual reasoning—is question-begging.[11] Since the court started with the assumption (which is indeed generally agreed) that the event on which the promise is to take effect in a unilateral contract is always a condition in the strict sense, then of course it follows, *once we have classified the contract as unilateral*, that if the event does not occur precisely as stipulated, there can be no liability. But if policy, justice, fairness demand that the promise should not be treated as conditional, then we should not classify the contract as unilateral.[12] Purely as a conceptual matter, the contract could perfectly well have been classified as bilateral. Thus proviso (d) and the requirement to call on Eagle to purchase within a reasonable time could have been treated as promises, breach of which could have been remedied in damages.

No hardship would have been done to Eagle had this course been adopted in this case. If they were in fact prejudiced by the delay they could have claimed damages for breach of contract, to be set off against the price of the aircraft; but as the aircraft

[11] The court's approach is also open to the objection that it seems to lead straight to another of those preposterous *Bridge* v. *Campbell Discount Co.* [1962] A.C. 600 situations, in which a party is better off if a term is construed as a promise which he has broken, than if it is construed as a condition which has not occurred. Thus in the present case U.D.T. would have been better off if they had actually *promised* to call on Eagle to repurchase within a reasonable time, and had broken that promise, because they could then at least have argued that the breach sounded in damages only. Even on this approach, the advantage to the promisee of being held to have made a promise himself should in theory be apparent and not real. This is because it will only in fact prove advantageous to him if the breach of his promise is held not to discharge the promisor, and in strict logic the promisor must be held discharged if the promise was conditional. But what happens in strict logic and what happens in practice are not always the same, as is in fact illustrated by the divergent views taken by Widgery J. and the C.A. in this case. The whole difficulty is avoided if we first inquire whether the promise was conditional, for if it was conditional the promisee can never be better off, and may be worse off, if the condition was also a promise by him.

[12] Diplock L.J.'s conceptual analysis is somewhat unconventional in that he treats the question as being whether an obligation (rather than the whole contract) is unilateral or bilateral. I think this is contrary to the normal usage (*cf.* Restatement, *Contracts*, § 12) but a more serious objection is that in a large number of situations it would substitute a conceptual, question-begging, issue (is the promise bilateral or unilateral?) for the really important issue (is the promise conditional?).

was eventually sold as scrap it seems very probable (unless U.D.T. were uncommonly incompetent) that the aircraft was virtually worthless anyhow when the hire-purchase agreement was terminated. The actual result thus seems unjust, though it is in line with the general tendency of the English courts (to which the insurance cases are perhaps exceptional) to treat stipulations as conditions rather than as promises, breach of which can be remedied in damages.[13] Is it too much to ask that the courts should justify this tendency in rational terms rather than with conceptual mumbo-jumbo?

P. S. ATIYAH.

CHARITY AND THE WELL-TO-DO SICK

THE limits subject to which gifts for the relief of the sick will be held to be made for charitable purposes were considered in two recent and contemporaneous decisions, one of the Privy Council and the other of the Court of Appeal.[1]

In *Le Cras* v. *Perpetual Trustee Co. Ltd.*, one of the issues to be determined was whether a bequest of income to the Sisters of Charity for the general purposes of a private voluntary hospital was a valid charitable gift. Lord Wilberforce, in delivering the judgment of the Board, said: "A gift for the purposes of a hospital is prima facie a good charitable gift. This is now clearly established, both in Australia and in England, not merely because of the use of the word 'impotent' in the preamble to 43 Eliz. c. 4,[2] though the process of referring to the preamble is one often used for reassurance,[3] but because the provision of medical care for the sick is, in modern times, accepted as a public benefit suitable to attract the privileges given to charitable institutions."[4] But two

[13] For some other illustrations of this tendency, see Treitel, 80 M.L.R. 129 at pp. 144–148.

[1] *Le Cras* v. *Perpetual Trustee Co. Ltd.* [1967] 3 All E.R. 915, an appeal from a decretal order of the Supreme Court of New South Wales; *Re Adams (deceased)* [1967] 3 All E.R. 285. Judgment in the *Adams* case was delivered between the hearing and judgment in *Le Cras'* case. In neither was any reference made to the other.

[2] The preamble to the Statute of Elizabeth referred to "aged impotent and poor people," adjectives which are interpreted disjunctively.

[3] "There are few modern reported cases where a bequest or donation was made or an institution was being carried on for a clearly specified object which was for the benefit of the public at large and not for individuals, and yet the object was held not to be within the spirit and intendment of the Statute of Elizabeth. There is, however, another line of cases where the bequest did not clearly specify the precise object to which it was to be applied, but left a discretion to trustees or others to choose objects within a certain field. There the courts have been much more strict, so that if it is possible that those entrusted with the discretion could, without infringing the testator's directions, apply the bequest in any way which would not be charitable . . . then the claim that the bequest is charitable fails." *Scottish Burial Reform and Cremation Society Ltd.* v. *Glasgow City Corporation* [1967] 3 All E.R. 215, *per* Lord Reid at p. 218.

[4] [1967] 3 All E.R. 915 at p. 920.

kinds of hospital would not qualify as charitable institutions, namely, hospitals run for profit [5] (which this was not), and hospitals which cater for an insufficiently large section of the public to meet the tests of public character.[6]

It was argued that the second exception applied, in that, as admission to the hospital was limited to fee-paying patients, the persons to benefit included only the well-to-do. A dictum of Lindley L.J. in *Re Macduff* [7] was prayed in aid: "I am quite aware that a trust may be charitable, and yet not confined to the poor, but I doubt very much whether a trust would be declared to be charitable which excluded the poor." [8] This argument was rejected on two grounds: First, providing "medical treatment otherwise inaccessible but in its nature expensive" [9] was not the same as excluding the poor *qua* poor; secondly, even if only a few benefited directly, there was an indirect benefit to the public at large because pressure on a neighbouring general hospital was relieved.[10] Accordingly, the gift was held to be charitable.[11]

In *Re Adams (deceased)*, the Court of Appeal had to decide whether a direction to apply capital "in endowing beds for paying patients" in the Finchley Memorial Hospital was a valid charitable bequest. This was a general hospital coming under the authority of the Minister of Health and run by a hospital management committee, pursuant to the National Health Service Act 1946. It had twelve "amenity" beds for patients who pay for part of their accommodation,[12] and ten "private" beds for those who pay the whole cost.[13]

The court treated this issue as one of construction only. At first instance, Cross J. had held that the gift failed, as there was no demand at the hospital for further paying beds.[14] The Court of Appeal reversed this decision, holding that "endowing beds for paying patients" could include applying the income to provide

[5] *Cf. Re Smith's Will Trusts* [1962] 2 All E.R. 563.
[6] [1967] 3 All E.R. 915 at p. 921.
[7] [1896] 2 Ch. 451.
[8] *Ibid.* at p. 464. Lindley L.J., in holding that a bequest for charitable or philanthropic purposes was not a good charitable gift, was here endeavouring to give an example of a gift which would be philanthropic, but not charitable.
[9] [1967] 3 All E.R. 915 at p. 922.
[10] *Ibid.* at p. 923.
[11] In *Scottish Burial Reform and Cremation Society Ltd.* v. *Glasgow City Corporation* [1967] 3 All E.R. 215, the House of Lords held that the provision of cremation facilities by a non-profit-making company who made moderate charges for their services was a charitable purpose. This case and *Le Cras* case establish the general proposition that the fact that services are only available on payment of a charge does not of itself disqualify an institution from being a charity with the necessary element of publicity, within the fourth head of Lord Macnaghten's classification in *Commissioners for Income Tax* v. *Pemsel* [1891] A.C. 531 at p. 583.
[12] National Health Service Act 1946, s. 4. The contributions are fixed at 24 shillings per day for a single-bed ward, and twelve shillings a day for a bed in a ward containing two or more beds—National Health Service (Pay-bed Accommodation in Hospitals, etc.) Regulations 1958–1961.
[13] National Health Service Act 1946, s. 5.
[14] [1966] 3 All E.R. 825.

them with amenities, such as better furnishings, redecoration and food, telephones, television sets, etc.[15] None of the members of the court had any doubt that the provision of such amenities was a charitable purpose: "There is nothing unlawful in making provision for these amenities for paying patients in that way. In view of the heavy payments which paying patients have to make, they may well benefit from any provision which may be made for their comfort and welfare in the hospital."[16] "I do not think that it is at all irrational on the part of this testatrix; she may well have thought it worthy of reward that people should pay their own way."[17]

Preoccupation with construction and the meritoriousness of paying patients seems to have led to an important question being overlooked. Granted that a gift for the general purposes of a voluntary hospital is charitable (even if, as in the *Le Cras* case, it can only directly benefit paying patients), is the provision of every kind of amenity for patients (whether paying ones or not) to be treated as subject to the privileges of charity? So long as charitable status entails tax relief, the endowment of luxury must surely have some limit, even for the deserving well-to-do sick.

In *Re Cole*,[18] it was held by the majority of the Court of Appeal that, even if a gift of income for the general purposes of a county council children's home could be regarded as charitable, a gift for the "general benefit" and "general welfare" of the children in it from time to time could not, since the income could be applied in ways not charitable. A well known dictum of Romer L.J. in that case contrasts starkly with the above citations from Danckwerts and Russell L.JJ.: "I cannot regard the provision of television sets, etc., for the benefit of such persons as juvenile delinquents and refractory children in Southdown House as coming within any conception of charity which is to be found in the preamble. If it were, then I suppose a gift to provide the inmates of a Borstal institution with amenities would be charitable, which would appear to me to be an impossible contention."[19] Should charitable objects be measured by desert, or need?

J. W. HARRIS.

REMARRIAGEABLE WIDOWS

A PROBLEM which has recently been considered in the courts is the extent to which awards under the Fatal Accidents Acts should be

[15] [1967] 3 All E.R. 285 at p. 290, *per* Danckwerts L.J. Fresh evidence was adduced before the Court of Appeal listing the amenities which might be provided for paying patients.
[16] [1967] 3 All E.R. 285 at p. 290, *per* Danckwerts L.J.; the last sentence appears to contain a *non sequitur*.
[17] [1967] 3 All E.R. 285 at p. 291, *per* Russell L.J.
[18] [1958] Ch. 877, *per* Romer L.J. at pp. 887–888; *per* Ormerod L.J. at p. 890.
[19] [1958] Ch. 877 at p. 888.

reduced by the possibility of a widow remarrying. The general principle behind the award of damages under the Acts seems to be clear: the plaintiff may recover the pecuniary benefit which she would have received if the relationship of dependency which she had with the deceased had continued. But she can recover no more than her loss of dependency, and this loss may be reduced or wiped out by a new relationship of dependency established upon remarriage. The Court of Appeal in *Goodburn* v. *Thomas Cotton Ltd.*[1] has now reaffirmed the common law rule that the possibility of the widow remarrying must be taken into account in assessing the award. The problem is to determine how this is to be done. The difficulties were acutely appreciated by Phillimore J. in *Buckley* v. *John Allen & Ford (Oxford) Ltd.*[2]:

> "Is a judge fitted to assess the chance or chances or wishes of a lady about whom he knows so little and whom he has only encountered for twenty minutes when she was in the witness box, especially when no one has broached the topic with her? . . . Am I to label the lady to her face as attractive or unattractive? If I have the temerity to apply the label, am I likely to be right? Supposing I say she is unattractive; it may well be that she has a friend who disagrees and who has looked below the surface and found a charming character."[3]

Clearly, difficulties abound. How then is the problem to be solved? There appear to be four possible solutions.

A. *The Phillimore solution*

In *Buckley's* case Phillimore J. resolved to ignore the possibility of remarriage at least in the absence either of positive evidence of the widow's attitude, or of any statistical evidence. This approach was doubted in *Goodburn* v. *Thomas Cotton Ltd.* The principle behind the Fatal Accidents Acts is to compensate the plaintiff for the anticipated loss of dependency. The court, therefore, has no alternative but to prophesy what that loss might be, and remarriage would so profoundly affect the loss that it cannot be ignored. As Willmer L.J. observed:

> "difficult as the problem is, it is really no different in principle from the problem facing any judge where, in a personal injuries action, he must necessarily gaze into the future and assess the probabilities as to the injured person's chances of recovery, and as to the injured person's future earning prospects."[4]

B. *The traditional solution*

The Court of Appeal, then, affirmed the traditional rule that the possibility of remarriage must be taken into account. In this

[1] [1968] 2 W.L.R. 229; [1968] 1 All E.R. 518.
[2] [1967] 2 Q.B. 687.
[3] *Ibid.* at p. 695.
[4] [1968] 2 W.L.R. 229 at p. 232.

case the court made a specific calculation, multiplying the annual "dependency value" by the number of years for which, at the most, the court considered the widow likely to remain unmarried. More often, however, the courts have arrived at a total amount, without indicating the precise method of assessment, merely by "bearing in mind" the various factors to be deducted—including the possibility of remarriage.[5] Whichever mode of calculation is used, the court employs an "instinctive" or "intuitive" method of assessment based on its limited knowledge of the plaintiff from her appearance in the witness box.

The traditional approach has the virtue of being consistent with basic principles, but as appreciated by Phillimore J. it is subject to the most powerful objections. Indeed, the paradoxical conclusion is necessary that the more objectionable and unco-operative the plaintiff makes herself, the greater will be her award of damages—surely not an ideal solution. The possibility of future uncertainties necessitates guesswork, but prophecy based on such flimsy evidence is hardly satisfactory.

C. *The use of actuarial evidence*

Actuarial tables have been used to assist the calculation of damages in certain cases, and their wider use has been advocated.[6] An implication of Phillimore J.'s judgment is that their use in the context of the present problem could solve the difficulties. No tables were cited in either *Buckley* or *Goodburn*, but "remarriage rates" of widows within certain age groups are available.[7] An over-hasty assumption might be that the use of such evidence would avoid all the difficulties inherent in the "intuitive" method. The trial judge would simply reduce the award by a pre-determined percentage. The success of the method is, however, illusory.[8] The only differential used in the available figures is age, and this is not necessarily the most crucial factor. The trial judge, it is submitted, could not happily be content with such figures where the plaintiff is manifestly unattractive, physically or otherwise or, for example, subscribes to a religious dogma which forbids remarriage. If such exceptions are to be made, where is the line to be drawn? Yet it is perhaps arguable that, on balance, this method is to be preferred to the traditional "intuitive" method.

D. *Reviewable annuity awards*

The common law is, of course, committed to a system of single lump sum awards which must determine the measure of damages

[5] *e.g.*, *Miller* v. *British Road Services* [1967] 1 W.L.R. 448.
[6] Street, *Principles of the Law of Damages*, Chap. 5.
[7] *See*, *e.g.*, The Report by the Government Actuary on the First Quinquennial Actuarial Review to March 31, 1954, H.C. Papers (1954–55) Vol. VI, p. 127. Cited by Street, *op. cit.*, at p. 128.
[8] See also the comments of Lord Denning M.R. and Winn L.J. in *Watson* v. *Powles* [1968] 1 Q.B. 596.

once for all. Of late it has been much mooted (and the matter is now before the Law Commissioners [9]) whether a system of reviewable annuity awards should be adopted. Without entering into a discussion of the controversy, it is of interest to consider the extent to which this system would solve the present problem. Article 844 of the German Civil Code provides an interesting possibility:

> "If a person was killed at the time when he was under a legal obligation to support a third party . . . the wrongdoer must compensate the third party by the payment of a money annuity in so far as the deceased would have been bound to furnish maintenance during the probable duration of his life."

This notion of substituting the defendant for the decedent, combined with the possibility of subsequent adjustment by a tribunal,[10] on the application of either of the parties in the light of changed circumstances is, it is submitted, the best solution to the problem of the "remarriageable widow." One objection that has been made to this scheme is of peculiar significance in the present context: the argument that this would encourage a widow "to live in sin" and thus escape the reduction of her award. It is, however, not beyond the capacity of the courts to deal adequately with this situation. In France, where a similar system operates, the court takes account of the fact that the widow is living in "a state of concubinage" and modifies the award accordingly.[11] If the administrative revolution necessary to accomplish this solution should prove too much for the fortitude of the law reformers, then it seems that the problem of the "remarriageable widow" will continue to haunt us.

A. I. OGUS.

SPECIFIC PERFORMANCE OF FOREIGN MONEY OBLIGATIONS?

THE recent devaluation of sterling will bring to the forefront the rule of English law according to which an amount of foreign currency claimed in English proceedings must be converted into sterling at the rate of exchange prevailing on the day when it became payable. This "breach-date-rule," established by two decisions of the House of Lords [1] means, for instance, that, if A in New York was on September 1, 1949, entitled to be paid $420 in New York by another New York resident under a contract governed by New York law and finds his debtor in England, he

[9] List of Official Committees concerned with the Reform of Law, June 1967, para. 19.

[10] The German Civil Law provides for the separate determinations of liability and damages.

[11] *e.g.*, *Dallos* 1959, 515.

[1] *The Volturno* [1921] 2 A.C. 545, and *Re United Railways of Havana* [1961] A.C. 1007.

now cannot normally recover more than $240, for at the date of breach $420 was worth £100 which now produces $240. It is possible that the law of New York may allow A damages for delay in payment and that such damages are recoverable here, but at present this is, for many reasons, far from certain.[2]

The principle has been justified by a variety of reasons none of which is compelling or even persuasive and all of which are curiously conceptualist in character. It also constitutes perhaps the most impressive illustration of a form of action ruling an important problem of modern commercial law from its grave, for in giving the leading opinion in the leading case in 1961 Viscount Simonds asked "learned counsel what in old days was the form of action where the claim was for a foreign debt. The answer was found after some research. It was enlightening *if not decisive*" [italics supplied]: it was an action *in detinet*.[3] Yet the rule has often proved iniquitous. It would, so the legal philosopher may speculate, perhaps never have been established if the claimant in the *United Railways of Havana* case had been a poor widow asking for $420 without interest, rather than an investor whose certificate of $1,000 was at one time worth only $147.50 and carried interest at the rate of 7½ per cent. per annum.[4] The iniquity lies in the elementary but unheeded fact that, as a recent critic has put it, "on a loan of one hundred dollars the sum to be repaid is [or should be] one hundred dollars," not $60, *i.e.*, the present value of £25 produced by $100 at the rate of 1949: Professor A. V. Levontin,[5] who does well in drawing attention to the fact that the rule, which does not prevail on the Continent or in the United States of America, was considered and rejected by several closely reasoned decisions of the Israeli Supreme Court. It is an equally unjust result of the rule that in the event of a depreciation of the dollar the lender of a sum of dollars becomes entitled to a sum of sterling which produces more dollars than the amount of the loan: see *Vionnet & Cie.* v. *Wills*.[6] It cannot, however, be expected that Parliament will enact remedial legislation, for a majority of the Private International Law Committee, without ventilating the merits of the argument, felt in 1961 unable to recommend a change.[7] This was no doubt the reason why in later years the United Kingdom did not participate in the preparation by the Council of Europe of a convention on the subject and is unlikely to sign the Convention which, on December 11, 1967 was opened for signature and has so far been signed by Austria, France, Germany and Luxembourg. It is to be feared, therefore, that in the foreseeable future English law will retain a rule which is almost

[2] See Mann, *The Legal Aspect of Money* (2nd ed., 1953), pp. 87, 252.
[3] *Re United Railways of Havana*, *ibid.* p. 1043.
[4] See *per* Lord Denning at pp. 1064, 1071.
[5] (1966) 1 Israel L.R. 250 at p. 319.
[6] [1940] 1 K.B. 72. See also the discussion in Mann, *loc. cit.*, p. 325 *et seq.*
[7] Cmnd. 1648.

universally condemned and is bound to work injustice whenever there are fluctuations in rates of exchange.

Recently, however, a new development has occurred which, in certain cases, may perhaps afford relief and which, therefore, justifies a return to the problem. The suggestion that this might in proper circumstances be solved by claiming specific performance [8] could not, it is true, derive much support from the earlier authorities. Thus, forty years ago, Romer J. (as he then was) denied that equity would entertain such an action, "for this among other sufficient reasons that damages at common law would have been a perfectly sufficient and adequate remedy." [9] Moreover, in *Re United Railways of Havana*, Lord Reid remarked *obiter* that "a plaintiff cannot get specific performance of a contract to pay dollars—it would not be right that he should." [10] And to the Editor of Dicey and Morris, *Conflict of Laws*, it "seems that, on general principles, a decree of specific performance for the payment of foreign money will not be granted in any circumstances." [11] Such reasoning cannot be readily followed, for in the case of sterling depreciating (a contingency which Romer J. was not contemplating) damages at common law cannot be an adequate remedy, and whenever there is any substantial variation of the rate the idea of specific performance cannot be wrong.

It is, at this point, however, that the implications of the recent decision of the House of Lords in *Beswick* v. *Beswick* [12] will have to be examined. Fortunately, that was the case of a poor widow who, under a contract made for her benefit by her late husband, claimed £5 per week without interest from the defendant for the business already transferred to him. So the courts showed due disinclination to accept such fetters as history or conceptions might have been thought to impose, and gave short shrift to the defendant's argument that specific performance could not be claimed on the ground that the claim was for money and damages were an adequate remedy. As Lord Hodson put it [13]:

> "Indeed, on this aspect of the case it seems that most of the appellant's defences were down before the case reached your Lordships' House. For example, it was argued at one time that the equitable remedy of specific performance of a contract to make a money payment was not available. This untenable contention was not proceeded with. Further it was argued that specific performance would not be granted where the remedy at law was adequate, and so should not be ordered. The remedy at law is plainly inadequate, as was pointed out by the Court of Appeal, as (i) only nominal damages can be

[8] Mann, *loc. cit.*, p. 517.
[9] *Lloyd Royal Belge* v. *Louis Dreyfus & Co.* (1927) 27 Ll.L.R. 293 at p. 293 (C.A.).
[10] [1961] A.C. 1007 at p. 1052.
[11] 8th ed., 1967, p. 889, n. 90.
[12] [1967] 2 All E.R. 1197; [1968] A.C. 58.
[13] [1967] 2 All E.R. 1197 at p. 1207.

recovered and (ii) in order to enforce a continuing obligation it may be necessary to bring a series of actions, whereas specific performance avoids multiplicity of action. Again, it was said that the courts will not make an order which cannot be enforced. This argument also falls by the wayside, for, plainly, the order can be enforced by the ordinary methods of execution " (see R.S.C., O. 45, r. 1, and O. 45, r. 9).

Beswick's case is of great importance to the whole problem of the structure of monetary obligations, for it adds much weight to Atkin L.J.'s dictum in *Société des Hôtels Le Touquet* v. *Cummings* [14] that " nominal damages in respect of the non-payment of a debt are a fond thing vainly invented, ' a mere peg on which to hang costs,' *per* Maule J. in *Beaumont* v. *Greathead* (1846) 2 C.B. 494, 500." In the realm of monetary obligations there is very little left of the distinction between debt, damages and specific performance. Although the normal type of case in which a defendant owes a sum of foreign money is, technically, distinguishable from *Beswick's* case where the money was due to a third party under a continuing obligation, this is, or should be, of little moment, for what matters is the justice and adequacy of the remedy. Suppose the purchaser of Mr. Beswick's business had promised to pay to the widow, not £5, but $20 per week, specific performance would, it is believed, not have been refused; and had the purchaser promised to pay the price by a single payment of $5,000 there would be no legitimate reason for withholding specific performance. If it is accepted that a creditor of $420 is entitled to and should receive $420, not $240, then, in the light of *Beswick's* case, equity should not refuse its aid. This is particularly so if it is appreciated that at the present stage of legal development there is no justification at all for retaining all the verbiage which has grown around equitable remedies and their discretionary character. Why, in the name of rational law, should a judge not award to the plaintiff what he has contracted to receive, what he is, therefore, entitled to and what the defendant has failed to pay? Why should conceptions, words, history continue to have precedence over the demands of justice?

F. A. MANN.

[14] [1922] 1 K.B. 451 at p. 464.

REVIEWS

LAWYERS AND THE COURTS. By BRIAN ABEL-SMITH and ROBERT STEVENS. [London: Heinemann. 1967. xiv and 504 pp. (with index). 68s. net.]

In this important volume the authors set out to provide a history of the movement for the reform of the administration of justice in England over the last two hundred years which, from the point of view of the present generation of lawyers, and indeed of the citizens of today, is the really relevant period. As they say, it is "history which leads up to and emphasizes the present problems" with which they are primarily concerned. The particular areas of this subject with which they concern themselves are, as their title makes clear, the courts system in which justice is, or should be, administered, and the legal profession, that is the people whose job it is to do the administering. The book in fact becomes an account of the development of the system over the period in question, though this is always tested, as it were, against a reformist standard.

Within this field they discuss not only the courts proper, but other "judicial bodies" such as arbitration tribunals, and not only professional lawyers, including the judges, but also their clerks, an element in the system the importance of which is almost always overlooked and on which in fact they say but little, and what they describe as "advisory services provided by non-lawyers" such as accountants. On the personal side, close attention is devoted, and properly, to the subject of legal education: indeed, apart from Professor Gower's well-known lecture, this is perhaps the best survey of the subject.

The book is obviously important; arguably the most important book on legal administration which has appeared in the present century. Its importance lies not so much in its content, which is often open to criticism, as in the wide horizon which it opens to view and in its method of approach, which is one of social evaluation by which it establishes its standards of judgment. It is both a sociological and a legal study of its subject-matter, the sociological aspects receiving the greater attention; and as such it is certainly the most ambitious and important which has so far appeared in this country. At the same time it hardly makes adequate acknowledgment of the pioneering work of the few others who have opened furrows in this field, such as Professor R. M. Jackson, whose *Machinery of Justice in England* discusses many of the matters elaborated in this volume, and in a similar vein.

The book ought to be compulsory reading for every lawyer, though the result would not be to convert all of them into law reformers—and it is reform which the authors frankly admit that they are after—because there is a certain amount of overstatement, a tendency to overlook a good deal of what, in a conservative profession like the law, must be regarded as substantial progress, and even an intolerance which I can well imagine will offend many lawyers of the older school who, with a more intimate knowledge of the working of the system, will regard many of the estimates which they find in this work as superficial. This is a pity because the merits of the book far outweigh its defects.

The authors are well equipped for the task which they have set themselves, except perhaps in one respect. Professor Abel-Smith is a social scientist of distinction who has specialised on social administration and Professor Stevens a lawyer whose achievements over a wide range of the academic field have already attracted attention. Each is clearly radical in his

outlook and no attempt is made to disguise the angle from which the book is written. The weakness which I have mentioned is a rather obvious lack of close acquaintance with the working of the system which they criticise—it is, I think, not without significance that the list of lawyers whom they thank for assistance in their Preface is composed almost entirely of academic as opposed to practising lawyers. It is, of course, true that you can only see a wood from the outside, but good forestry does need an intimate knowledge of the interior growth, particularly if it is of a jungle character.

In their interesting Preface, which in itself provides enough material for an essay, the authors point out how small is the work which has been done on their subject in the era under discussion, and contrast this with the abundance of research monographs which have appeared in the U.S.A. Their resources were limited and this no doubt explains why they have contented themselves so largely with the official material such as blue books, parliamentary reports, *et al.* These sources are, of course, quite inadequate: they seldom lay bare the hidden springs of action which as the authors themselves note in their Prologue are more important in this country of "political and social pressures" than anywhere else.

Almost all new developments in England begin with small pressure groups, usually of idealists—during the last twelve months we have witnessed two typical successes of this kind, the Sexual Offences Act and the Abortion Act. It has been much the same in the area with which this work is concerned. To take one example, much is said and said properly, effectively and critically, on the subject of Legal Aid—incidentally, we find in the Index, which is much the least adequate part of the volume, the entry "failure of present scheme 463–4": turning to page 463 we find the sentence "left to run the scheme itself, it (*i.e.*, the legal profession) provided an important service well"! The present scheme, "failure" or not, originated in the selfless work of many lawyers over many years working in small groups as "poor men's lawyers" or through organised societies such as the Bentham Society for Poor Litigants, and later on the organisational side by associations of progressive lawyers such as the Haldane Society, in which the present reforming Lord Chancellor, Lord Gardiner, graduated as a law reformer. The part of the iceberg which is above the surface is described with topographical accuracy at a number of points in the book: as for the rest we are told (p. 188) that "by the turn of the century a few voluntary bodies had developed to give legal advice to poor persons," a morsel of information which is filled out on a later page with some material about poor men's lawyer centres which increased notably in importance during the early years of the present century, and certainly provided one of the growing points from which the branches of today's robust tree developed.

There is so much meat in this book that it is with regret that I must decide to report on a few mouthfuls only, but turning to the detailed discussion we find that it is divided into three parts. Part I, after a thumbnail sketch of the development of the system from the earliest times down to 1750, treats of the following 125 years in rather more detail. Two out of the three chapters in this Part are headed the Age of Reform, a title taken, of course, from Holdsworth. The first half of this period was, I believe, a time of preparation for the reforms which were held up by the long period of war and near war, 1790–1815: it is wrong to describe these years as "barren." The creative work of Lord Mansfield in commercial law which is referred to appreciatively (p. 18) undoubtedly bore fine fruit, and he was far from being the only outstanding reformer of this period.

The Age of Reform is only shortly dealt with but understandably so, in view of the volumes added to Holdsworth's history in recent years. Much attention is naturally given to that great Benthamite innovation, the county court: the critical reaction of a large part of the legal profession is effectively brought out, but it is fair to say that there has probably been no

reform, however long overdue, which has not been opposed in some quarters. I should have liked to see warmer tributes paid to the great men to whose energy and enthusiasm the reforms of this period were so largely due. Brougham, it is true, receives his due mede of praise, but Westbury is only twice mentioned in the Index[1]; on one of these pages, when an unknowledgable reader might fail to connect him with Sir Richard Bethell, the impression is given that he was opposed to the Divorce Bill, which, without him, would hardly have gone through at that time. One of Westbury's major contributions to law reform was the part he played in the reorganisation of legal education, a subject which naturally figures prominently in this volume—there is only a footnote reference to this, and it is not one to which the Index refers. Indeed, no one could possibly gather from this book the dominating part which Westbury played in the mid-Victorian movement for legal reform.

Part II, 1875–1939, is entitled the Era of Stagnation. This title is understandable on a cursory view, but will not stand up to examination, as a description of the whole period. After all, it was into the twentieth century before the judges and the profession as a whole had settled down to working the revolutionary achievement of the Judicature Act 1873, and had begun to find their way about among the Rules of the Supreme Court, surely a production of which Justinian might have been proud—incidentally no real attempt is made here to evaluate the impact of these events upon the administration of justice.

Not so much progress was made in the earlier part of the twentieth century, though a period which saw a complete reorganisation of the land law and a useful reform in connection with the selection of justices of the peace can hardly be called stagnant. The 1930s witnessed the setting up of the Law Revision Committee and many useful reforms of the substantive law and some quite radical innovations in procedure, such as the virtual discontinuance of juries over a wide range of civil litigation, were effected during this era.

There was, however, undoubtedly a feeling during the inter-war years that society was developing more rapidly than its legal institutions. Such organisations as the Haldane Club, a society of Labour Party lawyers, mentioned here only in connection with legal aid in 1942, came into existence in the late 1920s. Its influence and that of the Society of Labour Lawyers which developed out of it, and later of the Inns of Court Conservative Association have undoubtedly been of great importance in the reform movement—the volumes *Law Reform* and *Law Reform Now*, which attracted much attention and have provided something of a blue print for the legal programme of the present Government were the work of the first two of these organisations. Not enough attention is given in this book to formative processes of this kind. There is a similar failure to put the work of the Society of Public Teachers of Law into full perspective in the sections on legal education to which I have already drawn attention.

Another example would be the Ministry of Justice. One would have expected this important project to figure largely in the pages of this work. It dates back indeed to Brougham and from time to time received influential support right down to the time when it was superseded quite late in the day by the more flexible and less ambitious scheme for a Law Commission. Its only appearance in this book is in connection with the support which it received from the important Haldane Committee on the Machinery of Government. There is confusion in the text at this point which is reflected in the index, which under "campaign for" refers us to page 108, at which page we are told that the campaign for a Ministry of Justice collapsed at the end

[1] I attempted to indicate very shortly at (1965) 28 M.L.R. 675 something of the part played by Westbury, Cranworth and Hersohell in the Victorian reforms. The last two do not figure in the Index at all, but these are just others of its too numerous failures: they are hardly mentioned in the text.

of the First World War, and to page 181 under "scheme revived" though on that page we find the reference to the Haldane Committee which in fact reported at the end of the war, so that the collapse and revival would appear to be concurrent, though when the scheme first came to life we are not told. This is really a quite inadequate treatment of an important movement.

Actually the proposal remained very much alive during the inter-war years when it was the subject-matter of a joint pamphlet by the Fabian and Haldane Societies, and it was strongly pressed in *The Reform of the Law* (1951), a volume prepared by the Haldane Society and sponsored by the Labour Lawyers: the opening sentence of the Preface to this volume reads "the central proposal of this book is the establishment of a Ministry of Justice." Even now there are those who hold that after the driving force of Lord Gardiner is removed a Department of Justice will be needed if the reform movement is not to fall back into its old happy-go-lucky condition.

An important aspect of court work, some would say the most important of all, since it is the court of which the ordinary citizen is most likely to have practical experience, is that for which the lay magistrates are responsible. No clear picture of this emerges from this study which is a little strange, as the authors are clearly aware of its importance.

During the 1930s, the magistracy was under very heavy fire not only from progressive organisations but in the general Press: it was no doubt the fact that large numbers of the better-off kind of citizen, in the shape of motorists, were appearing for the first time as defendants in their courts. This was focused by an excellent pamphlet, *English Justice* (1932) by "Solicitor," and there can be no doubt that the remarkable improvement in the work of these courts during the years since the last war derives from this agitation. One can pick up a certain amount of this from the text but the sociological impact is more sensitively described by Professor Jackson in his *Machinery of Justice*. Even in the Epilogue, where a survey of the whole position in respect of lawyers and the courts is made, no real effort is made to evaluate the magistracy and its work at the present time, which is one of real liveliness in the administration of criminal justice.

Looking over what I have written I see that a great deal of it is highly critical. It is natural that in a pioneering study of this kind there should be many deficiencies, and it is the duty of a reviewer to point out what appear to him to be the worst of these. I hope that the readers of this notice will not forget what I have said in my earlier paragraphs, and be deterred by my later criticisms, from a study of what by any standards is an important work.

They will find in it a great deal that is original, and even more that is thought-provoking. New areas of sociological-legal history are opened up in an interesting manner, and others are glanced at, which will provide ample opportunities of future research.

I was, for example, impressed by the story of demarcation difficulties not only within the profession but between lawyers and other professional and businessmen throughout the period with which the book is concerned. I had hardly realised how late it was that solicitors had established their monopoly hold on conveyancing, though there were in my early days at the bar still elderly colleagues with the entry "special conveyancer" in the *Law List*. On the whole it may be said that the solicitors have eaten into the barristers both in professional work and social position over the period of the book which no doubt explains whey they have largely lost interest in "fusion."

On the other hand, while successfully fighting off the bankers on conveyancing, the solicitors have lost to them on much advisory work, particularly on investing, and still more to accountants and even law stationers, who have to a substantial extent ousted them from company formation and much other legal work in connection with companies. At the same time a lively skirmish

has been going on with house agents. This is a subject to which inadequate attention has so far been given, which is strange considering how much the spot-light of history has been turned on to demarcation in connection with the trade unions.

There are a number of very strange errors of fact in this book which will no doubt be corrected in the next edition. Thus it is unexpected to find that Professor Stevens, who is known to be an admirer of Lord Reid's judicial work, is under the impression that he retired in 1964. And Lord Citrine will be surprised to find that he has written a book on Trade Union Law!

C.

SOCIAL DIMENSIONS OF LAW AND JUSTICE. By JULIUS STONE, LL.M., S.J.D., B.A., D.C.L.; Challis Professor of Jurisprudence and International Law in the University of Sydney. [London: Stevens & Sons Ltd. 1966. xxxv, 798 pp. and 185 pp. tables and indices. £5 5s.]

THIS volume forms the final part of the trilogy which constitute Professor Stone's *magnum opus*. *Legal System and Lawyers' Reasonings* (1964) and *Human Law and Human Justice* (1965) were reviewed in these pages in Volume 29 at pp. 214-216 and 577-579. In all they form a completely revised and substantially enlarged edition of his *Province and Function of Law* (1946). The scale of this trilogy is by modern English standards immense; the text runs to nearly 1,500 pages, and the footnotes to each on the average contain more lines than the text and are loaded with references and cross-references. In the work as a whole the author's grand design is "to explore the whole range of Western thinking on the nature, province and function of law" and "to capture and preserve, so far as one mind can, the continuity in the streams of thought on these matters into the present day." It has been a Herculean labour, pursued with prodigious industry (and, so one is led to suppose from the acknowledgements, with a local industry in Sydney) for at least twenty years, with conspicuous success. All scholars within the field or on the frontiers of Law must remain in the author's debt for the rest of this century.

In this volume the learned author sets out "to state in orderly fashion the contexts and range of tasks confronting modern democratic governments in using law as an instrument of social control, and as a means towards justice," *inter alia*. The range of the discussion is so wide, the tables of contents so long and so elaborate, and the reading time of most of the readers of this journal so short, that it would seem to be most helpful to summarise the main topics, so that the potential reader can fasten on to the chapters which have immediate appeal to him. There is much gold in these mountains of words.

In Chapter 1 social scientists' theories are treated historically and critically and on the whole with a lawyer's common sense. Though more heavily committed than most jurists to the liaison between Law and Sociology, Professor Stone remains non-committal on the question whether there is a separate Social Science called Law, urging rather the importance of carving out and maintaining channels of communication between Law and the new learning to be derived from the social sciences, and advocating more "law-centres," where lawyers, academic and practising, and specialists in the social sciences can collaborate at research level. In Chapter 2 Savigny's notions on the omnipotence of customary law and the links between a system of law and a nation's spirit are re-examined and exploded in the context of states like modern India and with reference to the new Europe. In Chapter 3, after rehearsing the contributions of historical jurispudence since Maine, Stone offers his own series of "strata" of social evolution: (a) kin-organised societies, (b) emerging

political societies, (c) societies on the rise of commerce, (d) expanding industrial societies, (e) complex economically-organised societies, and, tentatively, (f) the emerging supra-national societies.

Chapters 4–6 contain a rich vein of gold. In the first the author re-affirms his debt to Roscoe Pound and re-defines Pound's theory of Law, as a mechanism for securing interests operating in a particular society, and re-elaborates Pound's theory of Social Justice as the process of harmonising these interests. He only departs from his master's original theory in discounting his "jural postulates" and in discarding his third category of public interests. Otherwise he reproduces and expands the scheme of interests which Pound found to be operative in the U.S.A. in the 1950's, as summarised in his *Jurisprudence* (1959) Volume III. Chapter 5 then comprises a catalogue of a dozen Individual Interests and Chapter 6 of a score of Social Interests, which Stone "finds" to be operative in "Western Democracies" in this decade. Under each head of interest there is a critical examination of *de facto* claims in their social context, of the relevant policies, legislation and case-law. The subtle interplay of the various competing interests in certain political and family relations problems is fully worked out: *e.g.*, freedom of speech, and divorce. Only the frame of reference which Stone has adopted is so wide as to make his application of Pound's theory unfaithful to the original. Stone purports to identify the interests current in Western Europe, North America and Australasia (although 95 per cent. of his examples are drawn from the U.K. and the U.S.A.). But it is certainly not proven and wide open to doubt whether the citizens of Durham and Detroit, Boston and Bonn, Strasbourg and Sydney, make the same claims and cherish the same aspirations in this decade. "Even a scheme [of interests] initially well-based on empirical observation may fall into . . . vice, if we too intransigently transpose it lightheartedly to other societies": *ipse dixit*, at p. 177. The variety of socio-legal problems arising from men banding together in associations, particularly trade-unions in the U.K., are analysed in terms of interests, in a most illuminating discussion in Chapter 7. The problems of how to control monopolies and restrictive practices, in the U.K. and the U.S.A., are examined at length, if diffusely after the manner of economists, in Chapter 8.

The schools of thought which would deny to Law a place as an independent science, within the sphere of Sociology, from Comte to modern institutionalism, are the subject-matter of Chapters 9–11, and their essential fallacy laboriously exposed. The following chapter, entitled "Law and Socio-Ethical Conviction," should stimulate any common lawyer who is prepared to concede the possibility that new springs of knowledge relevant to Law may be tapped. It contains an exposition of the new science of Social Psychology, its exponents, its concepts, its tentative findings and their relevance to positive morality and hence to positive law. In Chapter 18, under the rubric "Law and Power," the learned author gives a highly sophisticated analysis of power in social, including political, relations, and presents a fresh interpretation of concepts like "the rule of law." Students of the judicial process in common law countries, who will skip the prolegomena to Chapter 14, and cut in at §5 and read on to §18, will find there many acute insights into this process and not a few fertile suggestions. They will be relieved to read, in §14, that we need not co-opt computers or their managers to the Bench, as these machines are unable to cope with values and are thus inimical with the administration of justice! In the final chapter, entitled "Law and Social Control," Professor Stone treats of the various forms of controlling societies, the obvious and the subtle, their efficacy and their limits, and maintains that—within maxima and minima—Law is indispensably one of them. Its essential role is to secure, in particular societies, their own hard-won "enclaves of justice."

The appended indices, of authors, bibliography, and of subject-matter, running themselves to over 100 pages, will probably be the starting points for most readers.

What positions in legal philosophy does Stone finally stand upon? In this volume his main concern has been to exhibit the many juristic problems which traditional juristic and modern sociological thinking have exposed, and to set out the many answers given by jurists over the last two centuries and by the new species of social scientists. Through it all there runs a vein of personal criticism, often hyper-criticism, disclosing personal positions, albeit each is immediately hedged thickly with many qualifications. By and large Stone remains a disciple of Roscoe Pound, giving pride of place in his analyses of legal problems to the human interests currently involved, and on questions of Justice favouring solutions which strike a balance between the competing interests while allowing for socio-ethical opinion operative in that society. Stone's "enclaves of justice" do not differ essentially from Pound's "jural postulates." Only where Pound retained a distinctively lawyer's approach to legal problems and pursued a consistent argument throughout his magnum opus (*Jurisprudence*, 5 Volumes, 1959) Stone has explored more deeply into the still controversial and confused areas of the relevant social sciences.

The ponderous style in which this work is written, the author's preference for the polysyllabic word and the involved sentence, his use of the first person plural, the use of the adjective "lamented" before the names of half the modern jurists, may, but should not, deter English readers. In this volume at one point, humourlessly, the author dares to castigate an American sociologist for his "involuted and esoteric language!" Yet in this trilogy the author's meanings are plainer to one who is willing to try to understand him than in his earlier *Province and Function of Law*. After all, Bentham is not easy to read. Further, on formal matters, it is fair to record that, compared with the earlier work, the type in these volumes is much kinder to the eye and the proof-reading and correcting has been well done.

This volume summarises an enormous range of juristic thought, taking in the contributions of literally hundreds of writers, across the world in this century and back several centuries in European philosophy. For this reason it is not to be commended in its entirety, even with its two companion volumes, as the basic books for an undergraduate course in Jurisprudence. Your reviewer holds firmly to the view that undergraduates should come to grips with juristic problems by reading clean through the original argument of a few of the masters, *e.g.*, Pound. An occasional reference to the relevant chapter in Stone will help to stir the critical faculty. But this is to speak of university syllabi, not to detract from the work Professor Stone set out to write and which he has splendidly accomplished, with a high degree of scholarship. This volume is an orderly and intelligent re-appraisal of the accumulated learning in the spheres of Law and the Social Sciences as they stand in the midst of the twentieth century. Professor Stone is indeed the doyen of the school of encyclopaedic jurists.

F. E. Dowrick.

THE LEGAL EFFECTS OF WAR. Fourth Edition. By LORD MCNAIR and A. D. WATTS. [Cambridge University Press. 1966. xlix and 469 pp. £7 7s.]

THE developments in the world scene since the third edition of this familiar work was published in 1948, and the large jurisprudence which has appeared, or has been reported since then, have involved considerable changes in and additions to the fabric of the book. This is particularly true of the treatment of belligerent occupation. The first chapter deals with the considerable impact of the United Nations Charter and the occurrence of conflicts involving forces acting under the authority of organs of the United Nations. However, the book remains an account of English law as affected by the external relation of the United Kingdom as a belligerent or neutral. The subject calls for

extensive use of the sources of internal law and of state practice and extends, *inter alia*, to the law of nationality, the procedural status of alien enemies and even private international law (marriage in territory under belligerent occupation). A vast foreign jurisprudence is drawn on in the account of belligerent occupation. The overall presentation combines elegance and clarity. Inevitably it is the first, quite brief, section on international law generally in relation to war and armed conflict which contains matters of large controversy. Thus the authors (at p. 9) take the view, which some others find difficult to accept that "if parties to a conflict have characterised it as a state of war, third states are bound thereby to the extent that they become neutrals and their relationship with the belligerents involves the rights and obligations of neutrality." This approach seems to have the same flaw as claims to freedom in, say, the fixing of maritime boundaries or the imposition of nationality; and it is not sustained in practice. This is particularly evident in relation to unilateral claims that war has not or has been terminated. The authors do not accept that there is an intermediate status between peace and war, a view which the reviewer respectfully shares. However, particularly in municipal law contexts, non-acceptance of a third status is not to be regarded as incompatible with a certain functionalism in approaching the definition of "war" or "armed conflict"; and yet the authors seem to adopt a monolithic concept of war, or at least assume that such a concept is available as an aid to categorisation. Incidentally in the same general section there is an unfortunate readiness to justify the United States quarantine of Cuba in 1962 passively, by neutral citation as "practice," and actively, by reference to claims to jurisdiction for purposes of medical quarantine. It was, of course, a selective blockade and nonetheless a blockade because only certain cargoes were aimed at.

IAN BROWNLIE.

VIENNA CONVENTION ON CONSULAR RELATIONS. By LUKE T. LEE. [Leyden: A. W. Sijthoff. Rule of Law Press: Durham, N.C. 1966. 815 pp. (Appendices and Index). No price stated.]

IN 1961 Dr. Lee published his original study of *Consular Law and Practice*. The present volume is substantially a different book but will take its place as the definitive work on consular law at least in English. Its substance is a systematic treatment of the Vienna Convention against the background of the preparatory work and other relevant legal materials. Appendices contain a list of recent consular treaties, the Draft Articles adopted in 1961 by the International Law Commission, the Final Act of the Vienna Conference of 1963, the Vienna Convention on Diplomatic Relations, the Draft European Convention on Consular Functions and Optional Protocol and the U.S.-Soviet Consular Convention of 1964. The text places the textual problems in historical perspective and is well documented. Unfortunately no bibliography is provided. The study is a timely reminder of the constructive role that consular conventions can play in the relations of states and, as Dr. Lee points out, the conclusion of the Vienna Convention has helped to promote bilateral conventions and to reduce uncertainty in the applicable principles. However, he is properly critical of deficiencies in the Vienna Convention, for example, its omission to take into account issues of dual nationality. The book is obviously a very useful addition to the literature. However, it may be that Dr. Lee has not explored certain implications of the modern role of the consul fully enough: thus the consular role in the protection of nationals may have important effects on the status of the consul before the courts of the receiving state (see the cogent study by Dr. Parry, in *Cambridge Essays in International Law*, p. 122 at pp. 153–154).

IAN BROWNLIE.

INTERNATIONAL LAW OF THE SEA. Sixth Edition. By C. JOHN COLOMBOS. [London: Longmans. 1967. xvii and 886 pp. 126s. net.]

THE publishing history of *Colombos* is the success story of the dominant monograph on its subject in English, and probably in any language, which has maintained a good tempo of new editions since its appearance in 1948. The success is no doubt partly due to the existence of a need for such a book but it is also explicable by the virtue which the book has of presenting a large quantity of information in good order and in a clear style. If one were to hold a class on the uses and utility of international law a copy of *Colombos* would serve as an exhibit. The forepapers of the book inform the reader that it has appeared in six foreign language editions, two of which were published in Moscow and Peking. Portuguese, Greek and Rumanian editions are in course of publication. It must be the case that the book is used for practical purposes by maritime services and not merely as a research or teaching aid in universities. The currency of the book is in a way rather surprising, since Dr. Colombos expresses the hope in his preface that the translations may contribute to making better known "the Anglo-American conception of international maritime law on which this book is mainly based."

The sixth edition is significantly larger than the last and new material appears on many topics including the Channel Tunnel, pirate radios, the European Fisheries Convention and recent developments in British practice. For all its vitality the book remains idiosyncratic and out of date in certain significant respects. Thus the territorial sea is still described as a special right of jurisdiction, and the rubric concerned with the territorial sea shelters various matters which really concern the contiguous zone. On the breadth of the territorial sea the author fails to get the pulse of the practice and the information given is very out of date. At certain points no real analysis is offered. Defence zones are catalogued but not related to the general law: moreover, he seems insensitive to these whilst anxious about matters relating to the territorial sea. The treatment of bays and other topics requires more reference to the issue of historic title. Curiously, the section on nationality of ships makes no reference to the High Seas Convention provision, or the *Nottebohm* and *IMCO* decisions, although these items are brought in elsewhere. In this and certain other instances the arrangement could be improved. The examination of forcible measures short of war is distinctly old fashioned and here and elsewhere the United Nations Charter is treated as an appendix and its effects on the law are not given full recognition. Modern developments are given a rather piecemeal treatment in Chapter XXII and should perhaps be better integrated in the main body of the work. The reviewer, of course, after the fashion of reviewers, has not listed the numerous areas of the text of nearly 900 pages on which he would not care to offer adverse comment. The text as a whole is readable and nearly always very much to the point.

IAN BROWNLIE.

DAS RECHT DER INTERNATIONALEN ORGANISATIONEN. By IGNAZ SEIDL-HOHENVELDERN. [Cologne: Carl Heymanns Verlag. 1967. xxxii and 824 pp. DM.19.80.]

THIS is a companion volume to the learned author's little textbook on Public International Law which was shortly reviewed at (1966) 29 M.L.R. 351. It is of very considerable value for every public international lawyer, for the literature on international organisations, while very large, is mainly descriptive in character. No such complaint can, happily, be levelled against Professor Seidl-Hohenveldern's book. Most, though not all, description is

banished to the fifty pages of the Annex. The book itself is divided into two parts. The first part, which is the more interesting because it deals with serious legal problems, is headed "Foundations" and discusses such questions as legal personality, the creation of international organisations, membership, relationship with non-member states and with other international organisations. The second part is devoted to problems of structure and organisation. Throughout an extensive bibliography is supplied.

Professor Seidl-Hohenveldern calls his work a short textbook, but it is much more. In the present state of legal development it is a very useful monograph. It has the great advantage that it faces, and answers, a large number of legal questions which many have chosen to ignore. The author's answers may not always meet with universal approval, but in view of the almost complete lack of judicial guidance and the small number of analytical investigations this is no cause for criticism.

F. A. MANN.

DEUTSCHES FAMILIENRECHT. By the late DR. HEINRICH LEHMANN. Fourth edition by DR. DIETER HENRICH, Professor of the University of Marburg. [Berlin: Walter de Gruyter and Co. 1967. 885 and x pp.]

THE first edition of this students' commentary appeared in 1925; since the third was published in 1960 changes in German family law have included the Family Law Amendment Law of August 1961. A new edition was therefore required.

Nevertheless, the standpoint of the book has not been changed; it is indeed an example in depth of Schopenhauer's dictum (quoted in the foreword to the first edition) that a point of view forms the kernel of all true knowledge. The individual view is pervasive in this book, and is diametrically opposed to that advanced by Dr. Leach in the last series of Reith lectures. In the author's view, it is the family that stands between the individual and the state; the state is bound to sustain the family which was in existence first and was the source of the community of the state. Family ties, as natural ties, have their own system of order, received from nature, religion and morals. Legislation in this field is therefore not lightly to be invoked, and can do no more than ensure an ethical minimum in the law; the best results can flow only from free consent of individuals.

Not unexpectedly, the author shows his distaste for the equal rights provisions of the Basic Law of 1949, the Equal Rights Law of 1957, and the decision of the Federal Constitutional Court that these invalidated other provisions by which, if mother and father could not agree about arrangements for the children, the father should decide.

These are not majority opinions today, and the fact that they are so unusual, and are here authoritatively advanced, makes these subjective opinions much easier to spot than others with which the reader might have more sympathy. The law itself is accurately and succinctly stated.

O. M. STONE.

FILM CENSORS AND THE LAW. By NEVILLE MARCH HUNNINGS. [London: Allen & Unwin. 1967 395 pp. and Appendices. 63s. net.]

MOVIES, CENSORSHIP AND THE LAW. By IRA H. CARMEN. [London: Cresset Press; U.S.A.: University of Michigan Press. 1966. 260 pp. and Appendices. 50s. net.]

To have for review two books on film censorship and the law is a pleasant surprise. They have much in common; both are of the Ph.D. type and based

on painstaking original research. Both suffer from the defects which all law books published by non-law publishers seem to have: inadequate legal citations and an out-of-date quality. The English book by Hunnings is in every way greatly superior to the American by Carmen. Both have surprising gaps. Although *Carmen* is confined to the American scene, he has nothing to say about censorship by pressure groups or about the workings of the Production Code Administration; he discusses no censorship other than sex censorship. *Hunnings* omits the question of film censorship for children for the curious reason that freedom of speech is a meaningless concept for children. I should have thought that the child cinemagoer was at the heart of any discussion on film censorship. The text of *Hunnings* appears to have been written by 1964; the Preface consists of a summary of subsequent recent developments. *Carmen* is greatly out of date; many leading cases and developments occurring well before publication are not dealt with.

Hunnings gives us a 150-page highly interesting survey of English censorship, which is much better than anything previously done. He follows that with good summaries of censorship in U.S.A., India, Canada, Australia, Denmark, France and Russia. There are very full appendices. *Carmen* is in a much smaller compass; its merit is in a detailed analysis of all the Supreme Court decisions which is refreshingly free from sycophancy. Yet most readers will find in *Hunnings* all that they need to know about the American scene, and a great deal more as well.

HARRY STREET.

THE CALIFORNIAN OATH CONTROVERSY. By DAVID P. GARDNER. [London: Cambridge University Press; U.S.A.: University of California Press. 1967. 255 pp. and Appendices. 52s. net.]

THIS is an account of the dispute at the University of California from 1949 to 1952 between the Regents and Faculty members about whether the latter should have to sign a new form of loyalty oath. This contest in the days of Senator McCarthy was apparently sparked off by the University's refusal to allow Harold Laski to lecture on the Berkeley campus.

The author tells us on the first page that this was a power struggle, a series of personal encounters between proud and influential men. Those who are thereby led to expect something on the lines of C. P. Snow's *The Masters* will be disappointed. He has had access to the official files and much private correspondence, and is content to give a dull factual account, often verbatim, of the minutes of meetings and of correspondence between the parties concerned. One never feels involved in the struggle and, even worse, scarcely cares about the outcome, which was inconclusive. The book is about as gripping as reading twenty-year-old minutes of faculty meetings at an English university. If you enjoy this book you are either a vice-chancellor or should now start to groom yourself for that office.

HARRY STREET.

AN INTRODUCTION TO THE LAW OF TORTS. By JOHN C. FLEMING. [London: Clarendon Press: Oxford University Press. 1967. 226 pp. 25s. net.]

PROFESSOR FLEMING was the ideal choice to write the book on Torts in the Clarendon Law Series. He has put to good use his unrivalled knowledge of the law of torts throughout the common law world. He has struck exactly the right blend of history, existing English law, law in other countries and analysis of the sociological and economic background. It is the ideal book for a law student to read immediately after he has completed his first survey of torts: it should enable him to sit back and separate principles

from detail and give him the criteria for assessing the quality of our tort law. At the same time I believe that the intelligent layman will get a better grasp of the function of the law of torts than he could in any other book.

Naturally the author concentrates on negligence. Yet I regret that he can find space only for fourteen pages on economic torts, which are now the Cinderella of the subject, despite their importance, difficulty and interest.

HARRY STREET.

THE ROLE OF ENGLISH LAW IN INDIA. By M. C. SETALVAD. [Jerusalem: Magnes Press. 1966. 76 pp. 16s.] (Distributed in the U.K. by Oxford University Press.)

DEMOCRACY IN INDIA AND THE JUDICIAL PROCESS. By M. HIDAYATULLAH. [London: Asia Publishing House. 1966. 89 pp. £1 net.]

SECULARISM: ITS IMPLICATIONS FOR LAW AND LIFE IN INDIA. Edited by G. S. SHARMA. [Bombay: N. M. Tripathi (for the Indian Law Institute, New Delhi). 1966. 257 pp. £1 2s. 6d. net.] (Distributed in the United Kingdom by Sweet & Maxwell Ltd.)

LAW OF CRIMES IN INDIA. VOLUME I: PRINCIPLES OF CRIMINAL LAW. By R. C. NIGAM. [New York & London: Asia Publishing House. 1965. xii and 505, 88 pp. £4 net.]

THE main problems regarding law in India are (i) whether the veneer of English principles, in particular the Rule of Law, will stick, come what may, and (ii) whether genuine, native Indian principles and ideals will make themselves felt through and by means of the legal system inherited from abroad, so as to give the latter cohesion, durability, and efficiency. The expressions of opinion by "westernised" Indians do not directly help to answer these questions, but one can read between the lines.

Mr. Setalvad is an ex-Attorney General of India, and may long remain the most important holder of that office. The choice of a juridical statesman to give the Lionel Cohen Lectures for 1966 at the Hebrew University of Jerusalem in succession to lecturers as well-known as Professor Goodhart (1953), Lord Denning (1961), and Professor H. L. A. Hart (1964) evidences the awareness in Israel, whose situation is not so unlike that of India (saving the lack of the federal element in the constitution), that Indian experience is at once a compliment to the English legal system and a pointer to its potentialities in an oriental setting. Israel being both western and oriental had something to learn from India. These lectures may have been a disappointment. They are informative and (considering the limited space) remarkably comprehensive. The dependence of the Indian judiciary upon English precedents even today is depicted if not accounted for. But when the lecturer speaks, as he repeatedly does, of "justice, equity and good conscience" and of the refusal to apply foreign principles if unsuited to Indian conditions he remains superficial, and to that extent unhelpful. As a historical introduction and a comment on the purpose and working of the Constitution and the Indian legal system in general these neat lectures are as effective as they are modest. India's membership of the Anglo-American family is convincingly, and no doubt accurately, asserted. It is claimed that Lord Denning once alleged that Indian precedents were considered by the Court of Appeal. (Was it in connection with the controversial rule in *Twedle* v. *Atkinson* (1861) 121 E.R. 762?) Mr. Setalvad usefully cites the very hostile *Kshirodebihari Datta* v. *Mangobinda* ((1888) 61 Cal. 841) without noticing the

orthodox *Subbu Chetti* v. *Arunachalam* ((1929) 58 Mad. 270.), but it will be long before England, or for that matter Israel, will follow Indian precedents while Indian special experience is related to Indian special conditions, and Indian judges refuse to apply their own native wisdom to problems which we share with their compatriots.

M. Hidayatullah is a judge of the Indian Supreme Court noted for originality and independence of mind. These lectures were delivered in the Lajpatrai Memorial Lecture Series. They are, like the volume next to be reviewed here, evidence of what leading minds in India are thinking and should not be omitted from a collection of publications serving as a commentary on India's celebrated and hard-worked Constitution. Justice Hidayatullah here gives the results of fifteen years' thought and feeling as he watched India's experiments with her new-won democracy, and played the controversial role of the judge in a country which believes in the separation of powers but does not hesitate to correct, sharply and promptly, its judges' (or rather the Founding Fathers') major "errors." The lecturer read widely and pondered deeply what he had to say, and these are no commemoration-day effusions. He interests himself in "the politics of men without personal ambition," a feature lending his words an added attraction, words, as they are, "without passion." Despaired of more by Indians than by foreign observers, democracy in India is in his view "wholesome and true." It must not "commit suicide." The "shrewdness" of the Indian voter has been illustrated by the latest elections, the result of which, of course, the lecturer could not have foreseen. He accuses the man in the street of failing to accept the price to be paid for a welfare state (which as yet India is not). India's problems are exacerbated by the fact that social reform is not promoted by reformers but by laws. And yet far too much is expected (in a truly oriental fashion) from the judicial process. The first two lectures quote liberally from foreign authors, from Aristotle to living American "experts" on Indian government, and prove the need of contemporary India to tell herself that she swings in the Anglo-American intellectual hammock. The last lecture aims to dispel misunderstandings as to the function of the judiciary. The judges interpret but do not add to the Constitution, which is their master as well as that of the other limbs of government. Judges are *not* the sole guardians of the rights of the people. Again, they have as often protected and defended the executive and the legislatures as they have vindicated private rights. There is a danger however (p. 72) that too close an adherence to precedent in interpreting the Constitution may result in socially harmful conservatism. An attempt to explain the lack of creativity amongst the judges (pp. 71 *et seq.*) is not satisfying. In fact the well-meant volume is a paradox, a hortatory sedative, educational for the audience to which it is addressed, but lacking original force. As an attempt to depict the society of which the judges should be the architects (Roscoe-Pound fashion) the lectures remain in the Cloud-cuckoo Land of the well-stocked library. What, after all, has the Habeas Corpus Act of 1679 to do with the starving peasants of Bihar? The multitudes of small blemishes in the text are insignificant beside this apparent lack of objectivity and realism. That this lack should be exposed in such a high quarter as the Supreme Court is extremely significant.

Because of the dramatic reforms of Hindu law and the (justified) threat to reform Muhammadan law in India the word "secularism" is an emotive term. It is supposed to be a good thing to be "secular." Ever since this word was attached to the Constitution, scholars, Indian and American, have disputed whether India really is a secular state. The Indian Law Institute under its energetic Director convened a seminar to discuss the term. Its proceedings now published are enlightening, not in that they tell us what a secular state is, nor whether India is one (for they reveal the utmost confusion of ideas), but what, rather, public men in India believe to be the virtue

of supposing that India is a secular state whatever that may be. Thus, incidentally, the several chapters reveal what is often a typical and traditionally Indian point of view. Taken in this light, the infuriating *non sequiturs* are tolerable. P. B. Gajendragadkar, the then Chief Justice of India, expressed the view that *dharma* ("righteousness" as understood before the advent of western ideas) was a secular concept and that the British period interrupted the otherwise regular secularising of the indigenous laws! Mr. A. R. Blackshield, in a paper which is too verbose and too heavily documented, wisely hints that secularism does not necessarily imply the hatred of religion which, understood as mere obstructionistic superstition, the majority of the seminar seem to have agreed to combat by all reasonable means. A. Fonseca supports the religious minorities by asserting that the secular state is essential to religious freedom. Justice S. S. Dhavan rediscovers his country's indigenous jurisprudence and finds therein (not uncharacteristically) all the virtues of secularism (with absurd results at p. 105). Justice M. H. Beg defines secularism as "all human thought and action directed towards securing human welfare in this world without any reference to or seeking the intervention of the divine or unseen powers." He finds that the objects of Islam conform to both secularism and utilitarianism. One wonders how the seminar would have received a contention that Islam, as a religion, contained essentially non-secular elements? The author contends that Islamic jurisprudence can contribute valuable ideas in formulating the uniform civil code which the Constitution promises to all Indians. Legislation should avoid imposing upon Muslims rules which are contrary to the *shariat* (the sacred Islamic law)! Other contributions to this volume exemplify similar or similarly apparently contradictory approaches, and it is pointless to list authors. But we may except Professor S. S. Nigam, who pleads realistically, if inaccurately, that marriage and adoption amongst members of different communities have different bases in the different religions, from which it would follow that uniformity should not be attempted (p. 162); and Professor P. K. Tripathi, whose study of judicial review is clear and cogent and makes a case for placing the individual above the group where the state has guaranteed the freedom of both. The general contempt for the Supreme Court's recent protection of a religious leader's right to excommunicate a member of the community for religious offences is difficult for the western reader to understand, until he is told (as he here must be told) that in India it is difficult to imagine such a leader acting impartially and uncorruptly. Professor Tripathi, like some others, is somewhat hampered by failure to accept that an individual can change his community or, in modern India, abandon a community without joining any other. Where the present judiciary do not see eye to eye with the Professor he explains it (pp. 193–194) by comparing them and their backgrounds unfavourably with those of the actual framers of the Constitution! The whole volume has suffered somewhat by being framed in the struggle between India and Pakistan: the co-operation of Indian Muslims with the government is taken as proof that India's alleged "secularism" pays off.

The last book to be noticed here is the best. The discouraging background of law teaching in Northern India has not prevented Professor R. C. Nigam from writing the first part of a doctrinal treatise on criminal law which has two distinct virtues: it takes into account the Penal Code and its history, the then English law of crime and all its subsequent developments and the best writers on criminal law in England and the United States, and rates the whole edifice, as scrupulously and meticulously developed in India (where appellate courts lean backwards to avoid a sentence, especially a death sentence, and where no attempt is made to lighten the load of the police), against the general background of Indian prejudices and preferences. This is a very delicate task, and the attempt almost unique. The truly Indian element is not obtrusive, for, if it were, the account of the continuing Anglo-Indian penal

law would be askew, but we may note with satisfaction that a treatise on the ancient criminal law, of which the author was for long a devoted student, will appear from the same pen. This volume deals with the history of criminal law (which perhaps ranges too wide), the nature and definition of crime, theories of criminal liability, *mens rea*, inchoate crimes, group liability, theories of punishment, jurisdiction and limitation, general defences, private defence and provocation, the pleas *autrefois acquit*, etc., and the topic of legal aid, on which the author makes recommendations to remedy the plight of numerous undefended accused whom the long arm of voluntary local legal aid societies does not reach.

In conclusion one may ask whether the development of Indian jurisprudence is not hampered by the supposition that to be a "jurist" it is necessary to have mastered all that foreigners have said (irrespective of context or relevance). Knowledge of Indian conditions and the Indian character seems to be a quality of which the judge seldom and the jurist never admits possession. The reason must be that it is prestige-worthy to know what any British or American scholar has written (with whatever plausibility) but prejudicial to the prestige to have one's own ideas based on one's, and one's contemporaries', actual experience. This is, as it happens, an Indian characteristic derived from not less than two thousand years of missionary, prestige-bearing, academic juridical-and-religious scholarship delivered from the social hill-top. And we are in the dilemma that if we want Indians to be truly Indian we must suffer them to be Brahmins in an age which professes to have no room for Brahminism. The answer to that problem lies beyond this reviewer's powers.

J. Duncan M. Derrett.

The Quantum of Damages. Volume 1: Personal Injury Claims. Third Edition. By D. McL. Kemp and M. S. Kemp. [London: Sweet and Maxwell. 1967. 788 pp. With First Supplement. £6 6s.]

This work is now so well known in the courts (and, perhaps more important, in solicitors' and counsels' chambers) that it is only necessary to note the appearance of a new edition. All the features which made earlier editions such a success have been retained, in particular the reference to unreported decisions of the Court of Appeal. (Attention may be drawn to the interesting judgment of Diplock L.J. in *Hvery* v. *Miles*, 1964 C.A. No. 261.) The table of classified awards in the Court of Appeal has been improved in substance and in style. (One wonders how long it will be before criminal practitioners have similar guidance on sentences made available to them.) There is a helpful glossary of medical terms, and the fashionable interest in actuarial evidence is catered for in Chapter 4 by the late Mr. William Phillips, who was a member of the Bar as well as a Fellow of the Institute of Actuaries.

But *Kemp and Kemp* has never been a mere compilation. It has always been noted for its careful investigation of disputed points. So the decision in *Browning* v. *War Office* is the subject of cogent criticism in Chapter 9. Not content with this, the authors return to the attack in a closely-printed Appendix of thirteen pages entitled "A Criticism of the Decision of the Court of Appeal in *Browning* v. *War Office*." The vigour of the onslaught is reminiscent of P. A. Landon's famous Appendices to the 15th edition of *Pollock on Torts*, but although no punches are pulled (Professor Street "is wrong," and Diplock L.J. is shown not to have checked his references) the tone throughout is fair and courteous. By the next edition we shall know whether the Law Lords have been convinced.

The standard of accuracy throughout is very high, but the junior author should have noticed the error in page 717, note 82.

R. F. V. Heuston.

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CODIFICATION OF THE LAW OF CONTRACT *

"Very little need be said about codification," wrote Professor Cross in 1960, "because it is not a live issue in this country at the present moment." [1] He was right: it was not then a live issue. But it is today, for within five years statute declared it to be the duty of the Law Commission to review the law "with a view to its systematic development and reform, including in particular the codification of such law. . . ." [2] Five weeks later the newly appointed Commission submitted its First Programme to the Lord Chancellor and included proposals for the codification of the law of contract, the law of landlord and tenant and, eventually, family law.[3] It is with the first of these that I am concerned.

Codification and the Common Law

The law of England is to be found partly in judicial decisions and partly in Acts of Parliament. Case-law is founded on the doctrine of *stare decisis*—keep to what has been decided—and is admittedly an ungainly form of law. A single case may discuss a single point of law or several; it may occupy two or three pages in the law reports or a hundred or more pages; the argument may be based on no previous cases or on ninety or more previous cases.

Most of our fundamental legal principles have emerged from decided cases. In principle it is much more straightforward to take your law from a statute, where you will, if you are lucky, find statements of law laid down in simple language, uncluttered by the detailed facts of particular cases. Handling a case is much more complicated. The rule may or may not be stated by the judge.

* An inaugural lecture delivered at Queen Mary College, University of London, on November 27, 1967, with the Hon. Mr. Justice Latey, M.B.E., in the Chair.

[1] Rupert Cross, *Precedent in English Law* (O.U.P., 1961), p. 197. He added: "it is difficult to believe that the codification of English law will not become a live issue within the next 50 years or so" (*ibid.* p. 199). I am grateful to Professor Cross for permission to quote him.

[2] Law Commissions Act 1965, s. 3 (1).

[3] First Programme of the Law Commission (Law Com. No. 1): H.M.S.O., 1965. The Second Programme of Law Reform (Law Com. No. 14) added the codification of the criminal law: H.M.S.O., 1968.

Usually it is, but you cannot rely on his words as a certain statement of the law, for the principle—the *ratio decidendi*—must be no wider than necessary for the decision of the instant case. The technique to be used for abstracting the *ratio decidendi* involves not only professional expertise but also an inspired appreciation of trends in judicial attitudes.

Small wonder that over the centuries voices have been raised in protest against the tons of verbal pulp that must be squeezed to obtain an ounce of pure judicial law. The story of unheeded or unworkable proposals for the codification of the common law has been well documented,[4] and one sometimes feels that the pursuit of a single, simple Act of Parliament stating the true and certain law, replacing all existing cases and statutes, is the legal equivalent of the trail of the Holy Grail.

In some countries parts of the common law have been codified, and in order to examine the common law experience codifications of the law of contract or allied branches of the law will be considered.

The Indian Contract Act, substantially an attempt to codify the English law of contract, was drafted in England between 1868 and 1866 by the Third Law Commission: its members included Romilly M.R., Erle C.J. and Willes J. It was revised in India by James Fitzjames Stephen (later Stephen J.) and was passed in 1872.[5] It was subsequently introduced into East Africa and elsewhere, but in the last six years Kenya and Uganda have forsaken the code for the English common law of contract.[6] The judges in Kenya did in fact suggest that the Indian Act should be replaced by a newly drafted Kenya code of contract, but the Government preferred to adopt the English law " which is a living law which changes with circumstances as it is developed and explained by the judges, which is easily ascertainable and on which we will have the full weight of judicial authority." [7]

Where the legal profession is undermanned or non-existent, and where books are hard to get, a code supplies a pressing need. This is no doubt one reason why events in the West paralleled those in the East. The Civil Code drafted by David Dudley Field for New York was never adopted there [8] but was passed in its original or

[4] A concise account with copious references is to be found in Chap. 19 of Roscoe Pound's *Jurisprudence*, Vol. III (1959). See also Pound, " Codification in Anglo-American Law " in *The Code Napoleon and the Common-Law World*, ed. Schwartz (1956).

[5] See Whitley Stokes, *Anglo-Indian Codes*, 1887, Vol. I, p. 534.

[6] Kenya in 1961 (Law of Contract Act, Laws of Kenya, Revised Edition, 1962, Cap. 23) and Uganda in 1962 (Contract Act, Revised Edition of the Laws of Uganda, 1964, Cap. 75) repealed the Indian Contract Act and applied to their respective countries the uncodified common law of England relating to contract with certain English statutory amendments.

[7] Kenya Legislative Council Debates, Vol. 86, col. 884, October 26, 1960 (Mr. Conroy, Temporary Minister for Legal Affairs).

[8] The legislature of New York State passed the Code in 1878 but the governor was greatly influenced by the opposition of many members of the legal profession and refused to assent.

amended form in Dakota Territory (now the two States of North and South Dakota),[9] California,[10] Idaho [11] and Montana.[12]

In England the three great Acts of Sir Mackenzie Chalmers [13] and its companion by Sir Frederick Pollock [14] were passed in the quarter-century between 1882 and 1906. This period was aptly described by Gutteridge as " the age of commercial codification." [15] The Bills of Exchange Act and the Sale of Goods Act were used as the foundation for the American uniform legislation on the same subjects,[16] and only in the last ten years have they been replaced by Llewellyn's Uniform Commercial Code, now adopted in forty-nine out of the fifty states. The United States has also had its non-authoritative codes in the *Restatements* of the American Law Institute [17] which attempted to state in a single source the laws of forty-nine jurisdictions without revealing that there were differences between them.[18]

OBJECTS OF CODIFICATION

Various reasons have been given over the years why codification is desirable. The case for codification in England at this time rests on the following arguments.

1. *Accessibility of the law to the legal profession*

On several occasions [19] Lord Gardiner has stressed the inaccessibility of the law: over 8,000 separate Acts of Parliament, dating from about 1235, contained in 359 different volumes [20]; ninety-nine

[9] 1865, the year the final draft was published in New York.

[10] 1872 (the same year that India passed the Contract Act).

[11] 1887.

[12] 1895. See generally Harrison, " The First Half-Century of the California Civil Code " (1922) 10 Calif. Law Rev. 185; Honnold, *The Life of the Law* (1964), Chap. 8. The civil code adopted in Georgia in 1860 was quite different: it consisted of a collection of excerpts from current law books. " The best that can be said for this is that it furnished an authoritative textbook of the common law at a time when there were few extensive libraries in the state and few law books at hand in many rural court houses . . .": Pound, *Jurisprudence*, Vol. III, p. 715.

[13] Bills of Exchange Act 1882, Sale of Goods Act 1893 and Marine Insurance Act 1906.

[14] Partnership Act 1890.

[15] " Contract and Commercial Law " (1935) 51 L.Q.R. 91, 117.

[16] Uniform Negotiable Instruments Law and Uniform Sales Act. They were also copied in many Commonwealth countries.

[17] Contracts, 1932; Agency, 1933, 2d 1958; Conflict of Laws, 1934; Trusts, 1935, 2d 1959; Property, 1936; Restitution, 1937; Torts, 1938, 2d 1965; Security, 1941; Judgments, 1942; Foreign Relations Law of the United States, 1965. See Honnold, *op. cit.* Chap. 4.

[18] That, at any rate, was the original policy; but it was later modified. See W. D. Lewis, " History of the Restatement," in *Restatement in the Courts*, 1945; and W. Barton Leach, " The Restatements as they were in the Beginning, are now, and perhaps henceforth shall be " (1957) 23 Am. Bar Ass. Jnl. 517–521.

[19] *Law Reform NOW*, 1963, Chap. 1; H.L.Deb., Vol. 258, col. 1079 *et seq.* (June 11, 1964); *Proposals for English and Scottish Law Commissions*, 1965, Cmnd. 2573; H.L.Deb., Vol. 264, col. 1142 (April 1, 1965).

[20] That was in 1965. Perhaps it should now be 361.

volumes of subordinate legislation; and well over 850,000 reported cases.

This is a perennial complaint. Writing our first law book in about 1188 Glanvill referred to "the confused multiplicity" of the laws and legal rules of the realm and confessed that "It is, however, utterly impossible" for them "to be wholly reduced to writing in our time." [21] Gibbon told of the state of Roman law six centuries earlier: "the infinite variety of laws and legal opinions had filled many thousand volumes which no fortune could purchase and no capacity could digest." [22] A tract of 1654 complained:

> "There being so many Law-Bookes of great Bulke, so many old mustie Records, Reports and Book-Cases; As that after the time spent in School-learning, the rest of the time of the flower of a mans yeares, would be little enough to reade them over, and peruse them." [23]

A little later in the seventeenth century Sir Matthew Hale C.J.K.B. wrote:

> ". . . by length of time and continuance lawes are so multiplied and grown to that excessive variety, that there is a necessity of reduction of them, or otherwise it is not manageable. . . . Thus as the rolling of a snow-ball, it increaseth in bulk in every age, till it becomes utterly unmanageable. . . . It breeds uncertainty and contradiction of opinion, and that begets suits and expence. It must necessarily cause ignorance in the professors and profession itself; because the volumes of the law are not easily to be mastered." [24]

The Lord Chancellor may be right in believing that this is the real case for codification, though it is important not to get carried away by the practical difficulties of the common law. One must not think that the mass of reports and statutes is all that daunting to the practitioner, whatever the effect it may have on the student.

The truth is that there are many practitioners who rarely open a law report more than two years old. Apart from keeping up to date with the latest *Weekly Law Reports* or *All England Law Reports* they will rely for their law on Halsbury's *Laws of England* (forty-two volumes, including index volumes, and a two-volume cumulative supplement), specialist textbooks and books of precedent forms and Halsbury's *Statutes* (forty-seven volumes up to and including the loose-leaf volume for 1967, and two volumes of supplement). Probably they will also take *Current Law* and one or more journals.

[21] Glanvill, *The Treatise on the Laws and Customs of the Realm of England*, ed. G. D. G. Hall (1965), Prologue, p. 3.
[22] *Decline and Fall of the Roman Empire*, Chap. 44.
[23] *An Exact Relation of the Proceedings and Transactions of the Parliament* . . . (1654), p. 16; cited G. B. Nourse, "Law Reform under the Commonwealth and Protectorate" (1959) 75 L.Q.R. 512, 526.
[24] "Considerations touching the Amendment or Alteration of Lawes," printed in *A Collection of Tracts relative to the Law of England* (ed. Francis Hargrave), Vol. I, p. 249 (Dublin, 1787).

Even for those lawyers who do refer to case reports in their daily practice, the figure of 850,000 cases gives a false impression. It must be remembered that a substantial number of those cases have been superseded by later developments in case-law or statutes. For example, a glance at the reports of the nineteenth century will reveal masses of "settlement" cases, where two parishes each claimed that a pauper was settled in the other, and so the responsibility of that other parish for the purposes of the Poor Law.

It is difficult to know how much cases really are used. In an attempt to find out, we may analyse the 484 cases reported in the three volumes of the *All England Law Reports* for 1965. In those 484 cases 3,865 cases were cited in judgments or referred to in argument. This gives an average of 8·9 authorities to a case, but like most averages this does not give a true picture. In thirty-six cases no authorities were cited, and in 108 cases—one-quarter of the total—two or less authorities were referred to. At the other extreme, there were forty-eight cases in which twenty or more authorities were referred to, the highest number being ninety-two (in *National Provincial Bank* v. *Ainsworth*,[25] the case of the deserted wife's equity). In 180 reported cases (80 per cent.), ten or more authorities were referred to. (See Figure 1.[26])

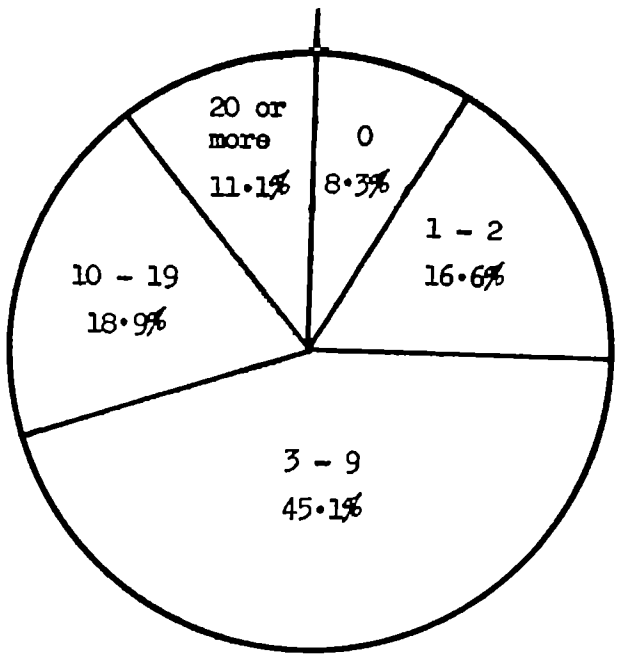


Figure 1. Number of authorities per reported case in 1965.

[25] [1965] 2 All E.R. 472, H.L.
[26] Fuller details are given in Table 1 in the Appendix.

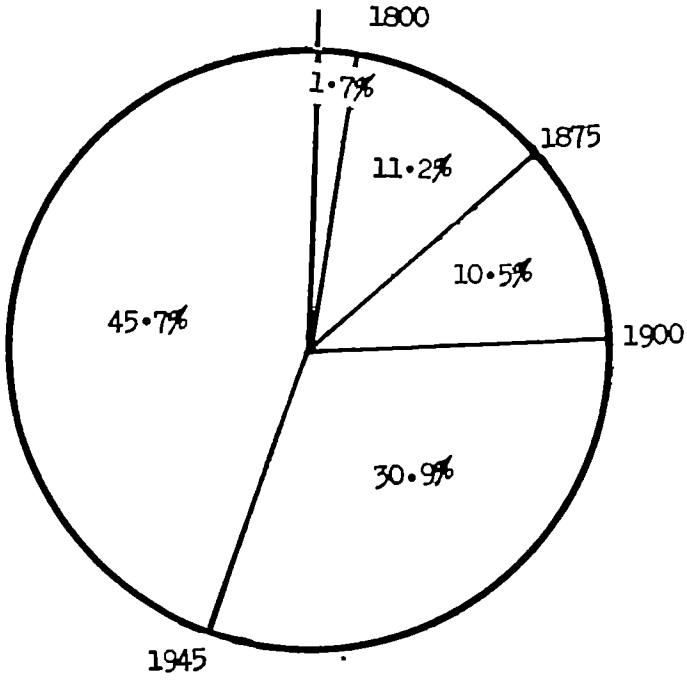


Figure 2. Dates of authorities cited in 1965.

Looking more closely at the cited cases, Figure 2 shows that more than three-quarters of them (2,959 cases, 76·6 per cent.) were reported in this century and nearly a half (1,766 cases, 45·7 per cent.) were reported since 1945. Only 12·9 per cent. (502) date from before the Judicature Acts (1875 or earlier), and only 1·7 per cent. (sixty-seven cases) from before 1800. There was one Year Book case (in 1470). This scarcely gives the appearance of an antique law (remember that the Civil Code of France dates from 1804).[27]

It is of interest, incidentally, to see that included in the 3,865 cases are thirty unreported cases, sixty-five Scottish cases, thirty-seven Australian, twelve Irish, twelve Canadian, ten American, four New Zealand, three Northern Irish and two South African cases, and one Indian case.[28] In addition to the regular series of reports, cases were cited from the *Criminal Law Review*, W.N., R.P.C., *The Times*, S.J., L.G.R., *Kemp and Kemp on Damages*, A.T.C., Hudson's B.C., C.P.L., E.G., J.P., R.A., W.P.A.R., W.R., L.J. (County Court), L.T. and L.T.(o.s.) (No prizes are offered for identifying the initials.)[29]

[27] Fuller details are given in Table 2 in the Appendix.
[28] This breakdown does not include cases cited in Privy Council Appeals.
[29] Foreign reports are not mentioned in this list.

A similar survey of the ten years from 1957 to 1966 enables us to compare the cases on the law of contract with those on codified branches of the law. During this period I found thirty cases that seemed to me to be based fairly and squarely on provisions in the Sale of Goods Act, the Bills of Exchange Act or the Marine Insurance Act. In those thirty cases some 888 authorities were referred to, giving an average of 12·9 authorities per case, appreciably greater than the overall average for 1965 (which of course included cases on recent statutes). (The authorities cited in individual cases ranged from two to forty-nine.) In the same period there were fifty-six cases on points of contract law that would probably be incorporated into a code: here a total of 968 authorities were referred to, an average of 17·8 authorities per case. I must of course point out that the selection of cases during this ten-year period was necessarily subjective and rather arbitrary, and other observers might reject cases I included or count cases that I rejected for one reason or another.

Figure 8 shows the 968 authorities cited in the contract cases, broken down according to date, and Figure 4 does the same for the 888 authorities cited in the code cases. It will be seen that although there are more very old cases cited on contract law (4 per cent. before 1800, the earliest being in 1602, as compared with 0·8 per cent. on codified law), there are still a substantial number of cases

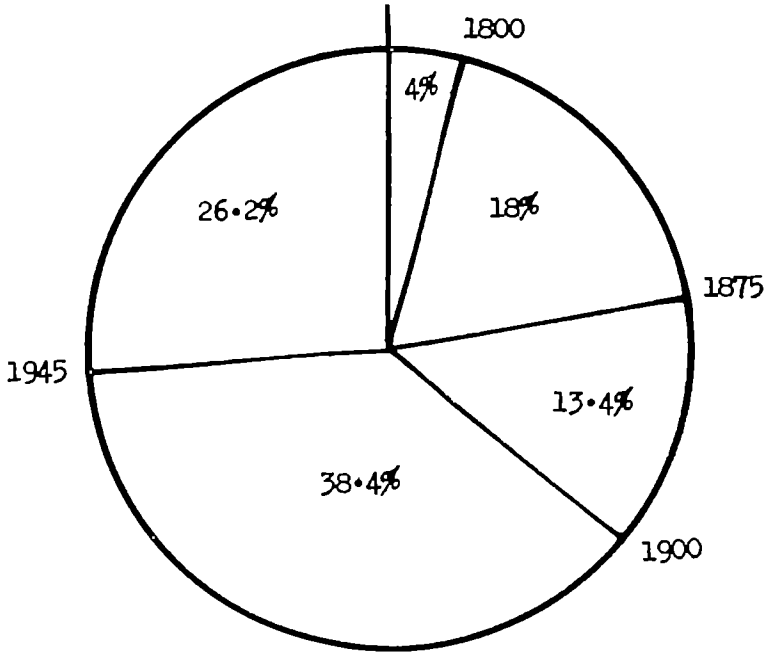


Figure 3. Dates of authorities cited in contract cases, 1957–1966.

cited in codified subjects from before the codes (the first code was in 1882).[30]

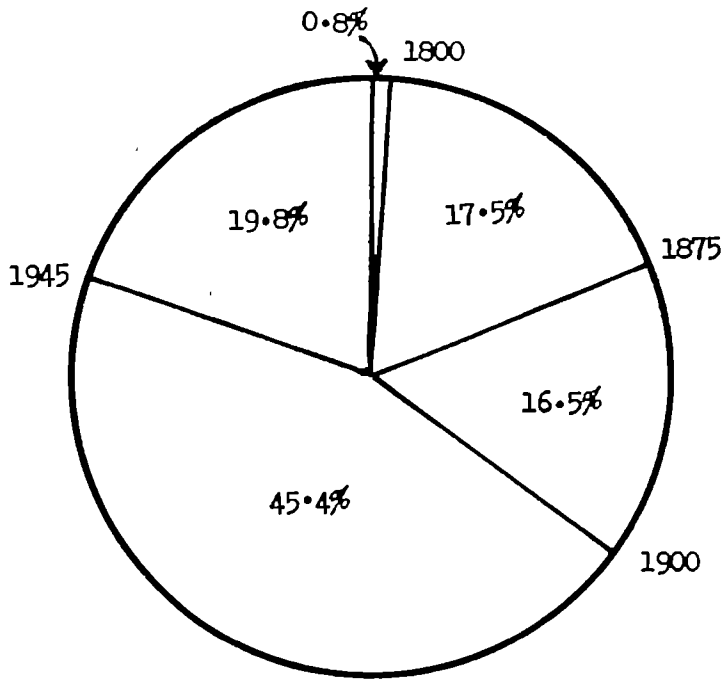


Figure 4. Dates of authorities cited in code cases, 1957–1966.

Although these figures give us some insight into the operation of our system of case-law, it is fair to say that they will not give a precise picture of the amount of case investigation involved in legal practice. No account is taken of the cases read and rejected for one reason or another. Nor are the reported cases I have chosen necessarily representative (though there is sufficient similarity between each of the three volumes of 1965 to suggest that none of them is wildly unusual). Moreover, the study is looking at—can only look at—reported cases: cases reported are likely to be those involving important, interesting or novel points of law. There must be many cases fought where no authorities were cited and the sole issue is one of fact. Without a different type of inquiry we can know little of the cases not reported, and even less of those not brought to hearing.

Nevertheless, the statistics suggest, and common sense tells us, that a code does make the law more accessible than the uncodified common law. One example may be given. A client consults his solicitor with a problem. He has ordered twenty-four cases of

[30] Fuller details are given in Tables 3 and 4 in the Appendix.

whisky. The seller now tells him that eight cases will be delivered tomorrow, eight cases at the end of the week, and the remaining eight cases early next week. Can the client insist on delivery of all twenty-four cases at one go?

This is a problem of sale, the law on which was codified by the Sale of Goods Act 1893. If we can imagine the solicitor faced with these facts in 1890, he would turn to the books for guidance and there be referred to the cases. The most recent case was *Reuter* v. *Sala* [31] in 1879. In that case Thesiger L.J. said: ". . . the sellers cannot call upon the buyers to accept any greater or less quantity of the article bargained for than the specified quantity." [32] But before advising his client that he would not be bound to accept delivery of any less than twenty-four cases, the solicitor would have been well advised to look at the case more closely.

Reuter v. *Sala* [33] occupies nineteen pages in the *Law Reports*. There are three judgments, Cotton L.J. agreeing with Thesiger L.J., and Brett L.J., the future Lord Esher, dissenting. The facts were different from those of our hypothetical client. The contract was for the sale of twenty-five tons of Penang pepper which were to have been shipped from Penang to London in October or November 1876. Twenty tons were shipped in November, but five tons were shipped in December, thereby not complying with the contract requirement as to date of shipment. By the time these facts emerged it was too late for the sellers to remedy the breach by delivering five tons of a November shipment. The Court of Appeal was unanimous that there had been a breach of contract, and the issue was whether the buyer could reject the twenty tons which complied with the contract or whether he was bound to accept and pay for the twenty tons, subject to a claim for breach of contract in respect of the five tons. The majority of the Court of Appeal held that the buyer need not accept any of the pepper; Brett L.J. held that the buyer must accept the twenty tons. All the judgments turn on the precise words used in a detailed written contract.

One does not have to be an experienced lawyer to be uncertain whether *Reuter* v. *Sala* would govern the problem of the whisky. In our problem we have no contractual time mentioned, and unlike the pepper case there is no question of an irremediable breach. Our 1890 solicitor might well hesitate before advising his client with certainty, and he could hardly be blamed for explaining that the law was unclear.

Now consider the solicitor faced with this problem in 1967. He

[31] *Reuter, Hufeland & Co.* v. *Sala & Co.* (1879) 4 C.P.D. 239, C.A.

[32] At p. 244. In *Honck* v. *Muller* (1881) 7 Q.B.D. 92, C.A., Bramwell L.J. said at p. 99: "Suppose a man orders a suit of clothes . . ., can he be made to take the coat only, whether they were all to be delivered together, or the trousers and waistcoat first?" The unspoken answer is No. The case, however, turned on whether the *buyer* of pig iron was entitled to insist on delivery by instalments other than those expressly stated in the contract.

[33] (1879) 4 C.P.D. 239.

will turn first to the Sale of Goods Act 1893, and he hardly need read more than the sixteen words in section 31 (1): "Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments." The law has not only been made more accessible (our 1890 solicitor would undoubtedly have investigated many more cases beyond *Reuter* v. *Sala*), it has also been made more certain. Whether it has been made more just is not so clear. *Reuter* v. *Sala* [34] came to court not because the quality of pepper changed between November 31 and December 9 but because the market price of pepper fell. Lawyers are trained to look for irrelevant facts on the strength of which their clients can get out of unwise contracts.[35] If our hypothetical buyer of whisky is not inconvenienced by three deliveries, should he be entitled to object?

2. *Accessibility of the law to the public*

If a code makes the law more easily accessible to the legal profession, it thereby makes the law accessible to the public. Take the example of delivery by instalments which has just been discussed. The 1890 solicitor would very likely not bother to explain to his client the tortuous processes as a result of which he came to his conclusion. If he had gone to counsel, he might, however, produce a copy of counsel's opinion to his client to confirm the client's impression that the law is a maze into which only the initiated may enter—and that even they would not be very sure whether they would get out again. The 1967 solicitor, by contrast, need have no hesitation. He can produce the Sale of Goods Act to his client and let him read section 31 for himself. The law is accessible to the public in the sense that a lawyer can readily advise his client and, if he wishes, explain the working of the law too.

But one suspects that the Lord Chancellor meant something more than that when he wrote in his White Paper that one of the hallmarks of an advanced society is that its laws should be readily accessible to all who are affected by them,[36] for he added that "it is extremely difficult for anyone without special training to discover what the law is on any given topic." [37] Presumably, then, one function of codification is to open the law to the masses: to make it personally available to the person Llewellyn described as the law-consumer.

This notion that every man could be his own lawyer is of respectable antiquity. Cicero tells us that "we learned the Law of the Twelve Tables in our boyhood as a required formula" (though with the traditional despair of the older generation for the younger he adds that "no one learns it nowadays").[38] The Massachusetts

[34] (1879) 4 C.P.D. 239.
[35] *Cf. Boston Deep Sea Fishing Co.* v. *Ansell* (1888) 39 Ch.D. 339, C.A.; *Jiwan Singh* v. *Rugnath Joram* (1945) 12 E.A.C.A. 21, 28–29.
[36] Cmnd. 2573 (1965), p. 2.
[37] *Ibid.*
[38] Cicero, *De Legibus*, II. xxiii. 59 (translated by C. W. Keyes).

Commission on Codification, of which the great Joseph Story was a member, had the same idea when it recommended in 1836 that the common law be replaced by statute-law. " The constitutions and the laws would then form a volume or two, written in concise, chaste, and elegant language, fit to be introduced into our common schools, and constitute the book of reading and study for the highest class." [39] Edward Livingston (1764–1836), sometime U.S. Secretary of State, who drafted the much-praised (but never adopted) Penal Code for Louisiana, " used to read what he had prepared to persons unskilled in law and test the excellence of his composition by their ability to comprehend it " [40]—a technique that might well be emulated by the draftsmen of our own Finance Acts.[41] Field argued that there was only one way to open the knowledge of the law to everybody: " writing it in a book of such dimensions and in such language that all can read and comprehend it." [42] Unfortunately not even lawyers could comprehend his Civil Code.

Perhaps the most eloquent testimony to the virtues of statute-law is to be found in Stephen's touching account of the impact of English legislation on India: " It is one of the many odd sights of Calcutta to see native policemen learning by heart the parts of the police act which concern them. The sergeant shouts it out phrase by phrase, and his squad obediently repeat it after him till they know it by heart." [43] It was to the Indian codes that Stephen attributed the popularity of legal studies at Indian universities.[44]

Ever since the Revolution the French have emphasised the importance of clarity in the law so that it can be known by the citizen. " Those engaged in the practice of law in France," wrote Professor Tunc, " are often surprised to see to what extent the law is known by ordinary people. . . . People are often ignorant of the details and sometimes mistaken. On the whole, however, they have a surprising knowledge of the law." [45] Those engaged in the recent attempt to bring the French codes up to date [46] still regard it as essential that the codes should be capable of being understood by what we may call " the man on the Montparnasse autobus." [47]

[39] Massachusetts House of Representatives, Report No. 17, 1836. Cited Honnold, *The Life of the Law*, 1964, p. 108.

[40] O. N. Gregory, " Bentham and the Codifiers " (1900) 13 Harv.L.Rev. 344, 355.

[41] *Cf.* Lord O'Hagan's suggestion that a department to supervise Bills should be set up: *River Wear Commissioners* v. *Adamson* (1877) 2 App.Cas. 743, 756; and Lord MacDermott's proposal that Bills should be scrutinised in draft " by a team of clause-tasters . . . who would be without any prior knowledge of the draftsman's instructions ": " Some Requirements of Justice," 1964 Jur.Rev. 103, 111.

[42] D. D. Field, " Codification " (1886) 20 Am. Law Rev. 1.

[43] Cited Gregory (1900) 13 Harv.L.Rev. at p. 352.

[44] *Ibid.*

[45] André Tunc, " The Grand Outlines of the Code," in *The Code Napoleon and the Common-Law World*, ed. Schwartz, 1956, at p. 22.

[46] Prof. B. Houin, " Reform of the French Civil Code and of the Code of Commerce " (1955) 3 Am.Jnl. of Comp. Law 485, 494.

[47] In his Preface to the 1960 Civil Code, drafted for Ethiopia by the French jurist Professor René David, the Emperor of Ethiopia wrote: " It is essential that

English lawyers have never laid much stress on lay knowledge of the law. They have preferred the esoteric nature of our legal system. The reason given by Coke for the use of French in the law still strikes a familiar note: " . . . it was not thought fit nor convenient, to publish either those or any of the statutes enacted in those days in the vulgar tongue, least the unlearned by bare reading without right understanding might suck out errors, and trusting to their conceit, might endamage themselves, and sometimes fall into destruction." [48]

Nevertheless, some recent social surveys have been undertaken to discover how far the English are acquainted with particular legal rules. One survey, sponsored by the Latey Committee on the Age of Majority,[49] investigated the familiarity of people aged between 16 and 24 with the incapacities of youth; the other, conducted under the auspices of the Consumer Council, sought to evaluate public knowledge of consumer rights under the law of sale of goods, codified for over seventy years. Figure 5 shows the percentages of those asked who knew the right answer, and of those who did not.[50] It will be seen that whereas 94 per cent. knew the minimum age for being served in a public-house, only 22 per cent. knew that under the Sale of Goods Act the retailer can be made liable for faulty goods. The results demonstrate that the subject-matter of a rule contributes more to its becoming widely known than the form of the law or, perhaps, that we are more interested in pubs than in shops.[51]

8. *Improvement of the law*

The real case for codification, I believe, is that it facilitates law reform. We can improve the content of the law when we create the new code; and we can improve it later by revising the code.

There are two kinds of codes. One merely seeks to reproduce the existing law, to translate case-law into statute-law without radical change; the other aims to produce a new set of principles, as the Uniform Commercial Code does. The Law Commission intend the new contract code to be of this second kind: " The intention is to reform as well as to codify." [52]

the law be clear and intelligible to each and every citizen of Our Empire, so that he may without difficulty ascertain what are his rights and duties in the ordinary course of life, and this has been accomplished in the Civil Code." I attribute my own difficulties in ascertaining the meaning of some of the provisions of the Code (which was drafted in French and promulgated in Amharic and English) to a common law background that would not be shared by the citizens of Ethiopia.

[48] 8 Co.Rep. xl. (1826 ed.).

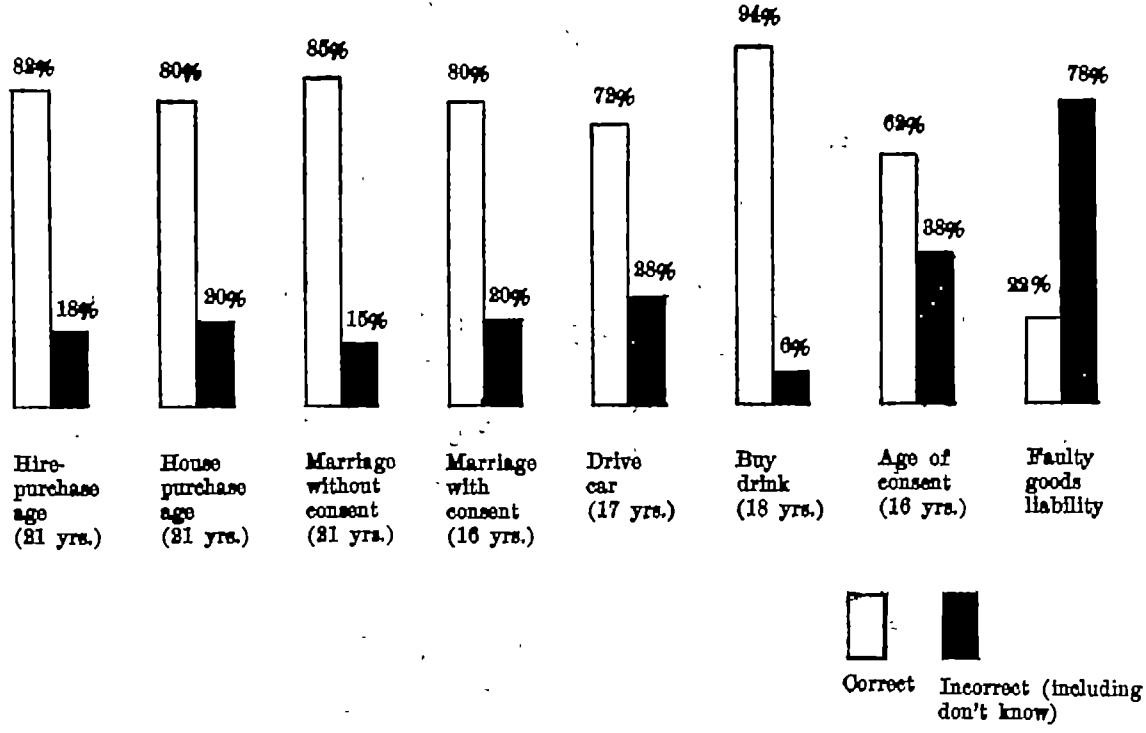
[49] The Report, Cmnd. 3342 of 1967, does not include these statistics.

[50] The questions asked, and fuller details, are given in Table 5 in the Appendix.

[51] I gratefully acknowledge the permission of Mr. Justice Latey and of Miss Elizabeth Ackroyd, Director of the Consumer Council, to quote the statistics in Fig. 5 and Table 5.

[52] The Law Commission, First Annual Report, 1965–66 (Law Com. No. 4), para. 31. Gardiner and Martin envisaged that reform must precede codification and

Figure 5. Knowledge of the law.



This differs from our previous experiments in codification. Chalmers, following Mr. Gladstone's advice,[53] believed that "A codifying Bill should in the first instance reproduce the existing law with all its defects and anomalies. . . ." [54] He feared a code purporting to change the law because of the professional zeal of our parliamentarians: "When a Bill is introduced which professes to alter the law, it comes at once into the category of opposed measures. Every member considers himself justified in expressing an opinion . . . The result is that the measure is so hacked and hewed at by ill-advised and hasty amendments that it emerges from Committee wholly disfigured." [55] Hence he prepared his own amendments in advance so that they could be introduced at opportune moments.

Macaulay, himself a great legal draftsman, took the same view just before he went to India when he spoke on the Bill that became the Government of India Act 1833. He told the House that codification could not be carried out by a large popular assembly, but by "a Government like that of India— . . . an enlightened and paternal despotism." [56] Perhaps now is a good time to codify.

Chalmers also envisaged that a code would be of permanent value because of the ease with which it could be reformed: "It is always easier to amend an Act than to alter common law. Legislation, too, is cheaper than litigation." [57] He would no doubt have been amazed that the first substantial amendment to the Sale of Goods Act [58] did not come for sixty years, and that was to repeal a section which had its origin in the Statute of Frauds 1677.[59] At last, in 1967, amendments to the Sale of Goods Act have started in earnest, so that it is easier for a buyer to reject goods [60] and it is now possible to buy a horse in market overt. This last reform is thanks to the Criminal Law Act 1967 [61]; no wonder the Law Commission is anxious about the form of the Statute Book!

There are other improvements that may flow from codification. In the field of foreign affairs, it will no doubt be easier to explain our law to our continental partners, whether in EFTA or in the

that accordingly codification could not have a high priority: *Law Reform NOW*, pp. 12, 18.

[53] See Lord Halsbury L.C., Introduction to the First Edition, Halsbury's *Laws of England*, reprinted in 3rd ed., Vol. 1, p. [187] at p. [188].

[54] Chalmers, "An Experiment in Codification" (1886) 2 L.Q.R. 125, 132.

[55] *Ibid.* p. 133.

[56] Speech in the House of Commons, July 10, 1833. See too Stephen, *A Digest of the Law of Evidence*, 9th ed., 1911, p. xx: "It would be as impossible to get in Parliament a really satisfactory discussion of a Bill codifying the Law of Evidence as to get a committee of the whole House to paint a picture."

[57] Chalmers, *Sale of Goods Act*, Introduction to First Edition (1894), reprinted in 15th ed., p. vii at p. viii.

[58] Formal repeals were effected by the Statute Law Revision Act 1908.

[59] Law Reform (Enforcement of Contracts) Act 1954, repealing s. 4 of the Sale of Goods Act 1893.

[60] Misrepresentation Act 1967, s. 4, amending ss. 11 and 35 of the Sale of Goods Act.

[61] Repealing s. 22 (2) of the Sale of Goods Act.

Common Market, and the Law Commission have been "mindful of the importance of achieving harmonisation with continental systems," [63] as well as setting out to draft a code common to England and Scotland.

And one cannot overlook the possible effect on lawyers themselves. As Austin puts it: "If the law were more simple and scientific, minds of a higher order would enter into the profession. . . . The profession would not be merely venal and fee-gathering as at present. . . ." [63] In words which might refer to our own Law Commission he added: "I am fully convinced that only from enlightened and experienced lawyers is any substantial improvement of the law ever to be hoped for." [64]

DIFFICULTIES OF CODIFICATION

Commendable as these objectives are, it would be foolish to ignore the difficulties that lie in the way of successful codification. These centre on the problems of statutory interpretation and the limitations of draftsmanship.

(a) *Judicial conservatism*

A code is intended to replace the earlier common law. How can one ensure that the judges, brought up on the common law and familiar with it, will wipe out their knowledge of the cases from their memories and concentrate on the statutory words? This has been a very real problem that has not always been successfully dealt with.

The Civil Code of California, passed in 1872, declared in section 4 that:

> "4. The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. . . ."

But the very next section, section 5, was not wholly in harmony with that sensible rule of interpretation:

> "5. The provisions of this code, so far as they are substantially the same as existing statutes or the common law, must be construed as continuations thereof, and not as new enactments."

Exactly what was the purpose of this section is far from clear. The Californian courts were understandably uncertain whether they ought to have regard to prior common law authorities until 1884,

[63] The Law Commission, Second Annual Report, 1966–67 (Law Com. No. 12), para. 29.

[63] John Austin, *Lectures on Jurisprudence, or the Philosophy of Positive Law* (3rd ed., 1869), Vol. II, Lecture 39, p. 708. (This lecture was not published in the original text of Austin's lectures, but was fortunately discovered in the notes John Stuart Mill took when he attended Austin's lectures at the University of London.)

[64] *Ibid.* p. 704.

when Professor J. N. Pomeroy published a series of articles on the method of interpreting the Code. He pointed out that many provisions in the Code were meaningless except to a person educated in the common law, and argued that the Code provisions " are to be regarded as simply declaratory of the previous common law and equitable doctrines and rules, except where the intent to depart from those doctrines and rules clearly appears from the unequivocal language of the text." This approach was soon adopted by the Californian courts, and consequently the prior common law remained a living source of the law.[65]

Exactly the same question arose at the same time in England, where the Bills of Exchange Act had been passed in 1882. Chalmers had included in section 97 (2) the following provision:

> " The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act . . ., shall continue to apply to bills of exchange."

In 1885 the case of *Re Gillespie, ex p. Robarts* [66] came before Cave J. In ignorance, no doubt, of Pomeroy's articles in California, he followed the same method: " The first question is, whether previous to the Bills of Exchange Act 1882, damages of this kind could be recovered. . . . Then comes the Bills of Exchange Act 1882, and the first provision to which it is important to call attention is section 97 (2). . . . It therefore follows, unless there is something in the Act expressly inconsistent with the ancient law, that the right to prove for damages of the kind which I have spoken of still exists." [67]

All six members of the Court of Appeal applied the same technique in *Vagliano Brothers* v. *Bank of England* [68] four years later. Lord Esher M.R., dissenting in his conclusions, said: " In order to arrive at the true interpretation of [the Bills of Exchange Act], I think it is necessary to consider not merely what was the law at the time of the passing of the Act, but what were the principles on which the different cases which declared the law were founded." [69] The majority, as distinguished a Bench as one could hope to find,[70] agreed that one must start with the prior law. In the House of Lords [71] Lord Bramwell (and perhaps Lord Field) adopted the same approach. Fortunately the majority thought

[65] A. T. Von Mehren, *The Civil Law System*, pp. 70–74; Honnold, *The Life of the Law*, pp. 128–137. For the failure of the Civil Code to introduce the French *cause* into the Californian law of contract as an alternative to consideration (Calif. Civil Code, s. 1550) see W. N. Keyes, " Cause and Consideration in California—A Re-appraisal " (1959) 47 Calif. Law Rev. 74.

[66] (1885) 16 Q.B.D. 702.

[67] *Ibid.* at p. 704.

[68] (1889) 23 Q.B.D. 243, C.A.

[69] *Ibid.* at p. 247.

[70] Cotton, Lindley, Bowen, Fry and Lopes L.JJ. The judgment was written by Bowen L.J.

[71] *Bank of England* v. *Vagliano Brothers* [1891] A.C. 107, H.L.

differently—fortunately because otherwise a code would in no way have served to make the law more accessible, but instead would merely have added an additional stage in a consideration of the authorities.

It was in this case that Lord Herschell gave us the classic statement of how to interpret a codifying statute:

> "I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view." [72]

But he went on to open the door to previous decisions " if, for example, a provision be of doubtful import," [73] and it is an unusually well-drafted statute that admits of no doubts. In practice, judges often look at the pre-code cases: this is particularly noticeable in cases on the Marine Insurance Act 1906,[74] while there are several cases on the law of sale of goods where the Act is not even mentioned.[75]

The truth is that it is very difficult to prevent judges from applying the law they know, and have learnt to love, instead of the new and strange statute. A clear illustration of this can be found in the Indian Contract Act of 1872. Although in the main this Act was intended to restate English law, a few deliberate changes were made. One of these was in section 108, which was in the Part which dealt with sale of goods and has since been repealed. The original intention of this section, as drafted by the Third Indian Law Commission in England, was to replace the English rule of *nemo dat quod non habet* by a general protection for innocent purchasers: " in other words, that every place in India should become a market overt." [76] The Government of India thought this went too far, and Stephen redrafted the section so as to protect the innocent purchaser only where his seller was in possession of the goods with the owner's consent.[77] This was still a far-reaching protection, and went beyond anything in English law, then or since. The words were clear, and English lawyers would recognise that they were

[72] *Ibid.* at p. 144.
[73] *Ibid.* at p. 145.
[74] See, *e.g.*, *British & Foreign Marine Insurance Co. Ltd.* v. *Samuel Sanday & Co.* [1916] 1 A.C. 650, H.L., *per* Lord Loreburn at p. 656, Lord Atkinson at p. 660, Lord Parmoor at p. 667 and Lord Wrenbury at pp. 672–673; and *Yorkshire Insurance Co. Ltd.* v. *Nisbet Shipping Co. Ltd.* [1961] 2 All E.R. 487, *per* Diplock J. at p. 492.
[75] See, *e.g.*, *McDougall* v. *Aeromarine of Emsworth Ltd.* [1958] 3 All E.R. 431; *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd.* [1949] 2 K.B. 528, C.A.
[76] Whitley Stokes, *Anglo-Indian Codes*, 1887, Vol. 1, p. 534.
[77] For the text of s. 108 see Diamond, " Sale of Goods in East Africa " (1967) 16 I.C.L.Q. 1045, 1056. This section is still in force in Zanzibar.

apt, for example, to enable a hirer under a hire-purchase agreement to pass a good title to the goods in his possession. Yet the Indian courts refused to interpret the section in this way.

The first hire-purchase case came before the courts the year after the Contract Act was passed. In it the Bengal High Court created two different kinds of possession. They distinguished between an unqualified possession, such as a factor or an agent for sale has, and a qualified possession, such as a hirer has, or where the possession is for a specific purpose. The section applied only to the former, not to the latter.[78] Later cases distinguished between custody and possession,[79] and possession under a simple bailment as contrasted with possession coupled with negligence or holding out.[80] In this way the effect of the section was severely limited, and it went little, if at all, beyond the common law.[81]

How can this problem be tackled? Some reformers have proposed vigorous action to prevent the courts from going behind the statute. New Jersey and Kentucky have both in their time passed statutes forbidding the citation of common law authorities, but for political rather than legal reasons.[82] Francis Bacon,[83] although not prepared to go so far as to advocate codification,[84] wished to see case-law and statute-law each digested. What of the superseded law? "It will be expedient in this new digest of laws, that the old volumes do not altogether perish and pass into oblivion; but that they be preserved at least in libraries, though the ordinary and promiscuous use of them be prohibited." [85] Perhaps they would be shelved with the obscene books in the British Museum.[86]

The real difficulty is in envisaging a completely self-contained code. According to the Law Commission: "The object of a code is, in our understanding, to set out the essential principles which are to govern a given branch of the law." A court, they go on, "is expected to discover in the code the principles from which the answer to a particular problem can be worked out." [87]

This is certainly the theory of continental codes,[88] but it would

[78] *Greenwood* v. *Holquette* (1878) 12 Bengal Law Rep. 42.
[79] *Biddomoye Dabee Dabee* v. *Sittaram* (1878) I.L.R. 4 Cal. 497.
[80] *Shankar Murlidhar* v. *Mohanlal Jaduram* (1887) I.L.R. 11 Bombay 704.
[81] Another example may be found in the Indian Contract Act treatment of the distinction between liquidated damages and a penalty: see Diamond, *op. cit.* (1967) 16 I.C.L.Q. at pp. 1075–1077.
[82] E. Haynes, *The Selection and Tenure of Judges*, 1944, cited Honnold, *The Life of the Law*, p. 191.
[83] "A Proposition to His Majesty . . . touching the Compiling and Amendment of the Laws of England," 1616: J. Spedding, *The Letters and Life of Francis Bacon*, 1872, Vol. VI, p. 61.
[84] *Ibid.*; Spedding, p. 67.
[85] *De Augmentis*, Book viii, Aph. 63, in Spedding's translation. Cited by Holdsworth, H.E.L., Vol. V, p. 487.
[86] See Peter Fryer, *Private Case, Public Scandal* (London, 1966).
[87] The Law Commission and the Scottish Law Commission: Published Working Paper on The Interpretation of Statutes, 1967, p. 45.
[88] See, *e.g.*, A. T. Von Mehren, *The Civil Law System*, pp. 60, 64 and generally.

be a radical departure for a common law code.[89] It has been said of the American Uniform Commercial Code that it " does not purport to contain all the law there is. If it had made such a claim, it may be doubted that the habits of thought which the entire jurisprudential tradition of the common law imposes on all of us would have allowed any of us to take the claim seriously." [90] Perhaps this is why a distinguished French jurist said recently of the Uniform Commercial Code that " It isn't really a code: it's a collection of practical solutions." [91]

As we have seen, one thing is certain. The existing English " codes " have not wiped out the old law. In Chalmers' *Sale of Goods Act* nearly half of the cases cited [92] still date from before the Act, and even in the more modern narrative works [93] as many as 20 per cent. of the cases are from before the Act.

(b) *Professional prejudice*

It is not necessary to dwell on the undoubted prejudice against legislation felt by common lawyers. A leading legal periodical will discuss the implications of a decision by a puisne judge but has no regular feature giving similar attention to new statutes. There are still people who distrust a code because it is impossible to foresee everything: but one seldom hears the common law criticised because only things that have already happened come before the courts. The notion of the completeness of the common law is today universally acknowledged to be a legal fiction, but its habits of thought remain.

(c) *The problem of drafting*

David Dudley Field saw clearly the problem: " There should be neither a generalisation too vague nor a particularity too minute, in the Code. . . ." [94] That he did not himself always succeed in hitting the right level of abstraction can be seen in his treatment of contracts in restraints of trade. Instead of laying down a broad and flexible rule that the area of restraint must be reasonable, he limited the effective area to " a specified county, city or part

[89] *Cf.* A. P. Sereni, " The Code and the Case Law," in *The Code Napoleon and the Common-Law World*, pp. 58–59.

[90] Grant Gilmore, *Security Interests in Personal Property*, 1965, Vol. I, p. viii. *Cf.* E. Allan Farnsworth, " Good Faith Performance and Commercial Reasonableness under the Uniform Commercial Code " (1963) 30 U.Chi. Law Rev. 666: " But it remains to be seen whether it [the Uniform Commercial Code] will succeed as a coherent and integrated codification rather than just a collection of related articles—whether the whole of the Code is anything more than the sum of its parts—whether the Code has any truly ' overriding and super-eminent principles.' "

[91] Prof. Denis Tallon: personal communication.

[92] 15th ed., ed. M. Mark, 1967: 747 cases out of 1610 (46.4 per cent.).

[93] Atiyah, *The Sale of Goods*, 3rd ed., 1966; Fridman, *Sale of Goods*, 1966.

[94] *First Report of the Commissioners of the Code to the New York Legislature*, 1858, cited Honnold, *The Life of the Law*, at p. 109.

thereof." [95] Thus state-wide and nation-wide restraints, which might be reasonable at common law, were impossible.[96]

The trouble is that there is a difference between case-law and statute-law. In case-law we are concerned with ideas, in statutes we are concerned with words. The Statute Book is littered with phrases that have become battlegrounds—" arising out of and in the course of the employment," [97] " absolutely void," [98] " debt, default or miscarriage of another person." [99] This problem of fixing the right level of abstraction is really: how much discretion should be left to the judge? Some of the difficulties arising from existing codes such as the Sale of Goods Act are due to excessive detail caused by Chalmers' attempt to codify the existing, but still developing, law. What started as the germ of a judicial idea, which might have been distinguished or overruled, became statute-law, binding on all courts including the House of Lords.

Take, for example, the rule that the buyer of specific goods could not reject them for breach of condition if he had become their owner under the contract,[1] a principle the application of which has anguished the academics,[2] though it has never actually been applied to its logical extreme in the English courts.[3] If any criticism had been voiced to Chalmers, he would no doubt have answered that he was simply stating what the common law was—or was thought to be —and that the remedy lay in amending legislation. That solution has at last, in 1967, been adopted.[4]

With a full-time Law Commission to keep an eye on the code once it has been passed, amending legislation may be quicker and more frequent in the future. But the question arises: must we depend on legislation, or can the common lawyers devise a code which is both precise and flexible?

(d) *Restriction on legal development*

The most telling objection to a code in a common law jurisdiction is that it limits the development of the law. The common

[95] See, *e.g.*, California Civil Code, s. 1674. The area for restraints between partners was limited to " the same city or town where the partnership business has been transacted, or within a specified part thereof ": s. 1675. These sections were replaced in California in 1941 by the Business and Professions Code, ss. 16601 and 16602.

[96] The Indian Contract Act unfortunately followed Field's code in s. 27, permitting restraints in connection with a sale of goodwill " within specified local limits ": see Pollock and Mulla, *Indian Contract and Specific Relief Acts*, 8th ed., 1957, pp. 224–225 and 283.

[97] Workmen's Compensation Act 1897, s. 1. [98] Infants' Relief Act 1874, s. 1.

[99] Statute of Frauds 1677, s. 4. [1] Sale of Goods Act 1893, s. 11 (1) (*c*).

[2] J. C. Smith (1951) 14 M.L.R. 178; S. J. Stoljar (1953) 16 M.L.R. 174, 179–180; P. S. Atiyah, *The Sale of Goods*, 3rd ed., pp. 107–108; G. H. L. Fridman, *Sale of Goods*, p. 73; *cf.* G. H. Treitel, *The Law of Contract*, 2nd ed., pp. 578–579.

[3] It was applied by the Court of Appeal for Eastern Africa in *Nurmohamed Murji* v. *Hussainali G. Datta* (1955) 22 E.A.C.A. 294. See Diamond (1967) 16 I.C.L.Q. at pp. 1069–1070.

[4] Misrepresentation Act 1967, s. 4, amending Sale of Goods Act 1893, s. 11 (1) (*c*).

law grows and changes. Statute-law is static until it is changed by the legislature. "It is the function of courts," says a modern master of the common law, "to mould the common law and to adapt it to the changing society for which it provides the rules of each man's duty to his neighbour." [5] But courts do not see it as their function to mould statute-law or to adapt it to our changing society.

Part of the problem lies in the lawyer's approach to an Act of Parliament. He does not see it as a creative force in the formation of new law, but rather as an interference with the "natural" development of the law by the judges. Hence the notion that Acts of Parliament must be strictly construed and the extraordinary presumption that a statute leaves the common law unchanged. Lawyers do not argue by analogy from statutes as they do from judgments, and many would think it wrong to do so. The late James Landis, Dean of the Harvard Law School, expressed this in a paragraph that cannot be bettered:

> "When the highest tribunal of England in 1868 decided that the land-owner who artificially accumulates water upon his premises is absolutely liable for damages caused by its escape [6] that judgment had an enormous influence throughout Anglo-American law.[7] . . . Had Parliament in 1868 adopted a similar rule, no such permeating results to the general body of Anglo-American law would have ensued. And this would be true, though the Act had been preceded by a thorough and patient inquiry by a Royal Commission into the business of storing large volumes of water and its concomitant risks, and even though the same Lords who approved Mr. Fletcher's claim had in voting 'aye' upon the measure given reasons identical with those contained in their judgments. Such a statute would have caused no ripple in the process of adjudication either in England or on the other side of the Atlantic. . . ." [8]

If we could devise a way to stimulate the judicial mind, to distinguish between statutes laying down limited solutions to limited problems and those containing in them more widely applicable truths, progress might be made. The process is not entirely unknown to judges, at least in the Divorce Division if not in the Queen's Bench. Statutes dealing with the divorce jurisdiction of our own courts have led the judges, in *Travers* v. *Holley* [9] and *Indyka* v. *Indyka*,[10] to create new law about our recognition of

[5] Diplock L.J. in *Indyka* v. *Indyka* [1966] 3 All E.R. 583, 591.
[6] *Rylands* v. *Fletcher* (1868) L.R. 3 H.L. 330. (Footnote in original.)
[7] See Bohlen, "The Rule in *Rylands* v. *Fletcher*" (1911) 59 Univ. of Pa.L.Rev. 298. (Footnote in original.)
[8] "Statutes and the Sources of Law," in *Harvard Legal Essays*, 1934, p. 213 at p. 221. The whole of this valuable essay repays careful study.
[9] [1953] P. 246, C.A.
[10] [1966] 3 All E.R. 583, C.A. The House of Lords decision ([1967] 2 All E.R. 689) was not based on a statutory analogy.

the jurisdiction of foreign courts. In this way legislation has acted as a source of ideas, rather like a common law analogy.[11]

This question of judicial attitudes to statutes is of fundamental importance to codification. The Law Commission is working on "the rules for the interpretation of statutes"[12]: it is no exaggeration to say that this problem must be answered before a code is implemented. There can be little doubt of the inadequacy of the present so-called "rules" of interpretation which can mean all things to all men and be used to justify any conceivable interpretation, and a few inconceivable ones.

The Uniform Commercial Code is interesting in this respect. It has lost the provision in an early draft that it should be deemed to state common law principles to be "applied, developed or limited" by judicial decision like other common law principles.[13] In its present version its second section provides that "This Act shall be liberally construed and applied to promote its underlying purposes and policies,"[14] and it goes on to spell out its purposes and policies: simplification, expansion and uniformity.[15] Of greater interest and utility is the "Comment" that follows each section, stating the purposes of the section, giving illustrations, and providing cross-references to other sections. This has been referred to by judges.[16]

The idea of a Comment would not be approved by everyone. Bentham saw the difficulty: how to describe the law without giving the description itself the authority of a statute. Many lawyers would agree with Lord Halsbury: "The more words there are, the more words are there about which doubts may be entertained."[17] But words are imprecise instruments. All too often it is difficult to understand what the draftsman is getting at in the absence of reasons and illustrations.[18] The risk of conflict between code and comment can be exaggerated, and it must be taken. Some of our most tortuous enactments are with us because the draftsman mistakenly thought brevity was a virtue; it takes more words, not less, to state complicated ideas clearly.

Whatever the drafting techniques adopted, nothing can save us

[11] For the use of statutory analogies in German law see S. Simitis, "The Problem of Legal Logic" (1960) 3 *Ratio* (Blackwell, Oxford) 60, 75–78.

[12] First Programme, 1965, Item XVII. First Annual Report, 1966, para. 107. Published Working Paper on The Interpretation of Statutes, 1967.

[13] Braucher, "Legislative History of the Uniform Commercial Code" (1958) 58 Col. Law Rev. 798, 810.

[14] Uniform Commercial Code, section 1–102 (1).

[15] See section 1–102 (2). See also section 1–106 (1).

[16] For example, in *L. & N. Sales Co.* v. *Little Brown Jug Inc.*, 12 Pa.D. & C. 2d 469 (1957). As to the Comment, see Braucher, *op. cit.*, 58 Col. Law Rev. 798, 808.

[17] Introduction to the First Edition, Halsbury's *Laws of England*, reprinted in 3rd ed., Vol. I, p. [187] at p. [191].

[18] *Cf.* Chalmers' *Sale of Goods Act*, Introduction to First Edition, reprinted in 15th ed., 1967, p. ix: "A rule can never be appreciated apart from the reasons on which it is founded."

from being bound by the attitudes and analyses of the draftsman. It is their structure that will contain the law of contract at least until the first major redrafting comes along in twenty, fifty or a hundred years' time. "In the case of a code, as of everything that should be systematic, the excellence of the first conception is everything." [19]

One example of the effect on legal development of the analysis adopted by a codifier can be found in the remedies available for breach of contract. One of the important remedies is the right not to perform. The question is: for what breaches of contract is the remedy of non-performance available?

We may answer this question by looking first at the contract: what obligation imposed by the contract has been broken? Some contractual terms are important, others are less important. It appears that in the general law of contract we may classify terms into three categories: (1) conditions, the breach of which entitles the party not in breach to refuse performance; (2) warranties, the breach of which never entitles the party not in breach to refuse performance; and (3) other terms, where what is important is not the initial classification of the term but the effect of breach.[20]

The third category is a relatively recent development. It was not recognised when Chalmers drafted the Sale of Goods Act, which divides terms into conditions and warranties only. This rigid analysis makes it difficult (though not perhaps impossible) to extend the welcome new reasoning of the *Hong Kong Fir* case [21] to the most common type of contract. (It is of interest, incidentally, to note that in Chalmers' original Bill of 1889 the buyer could reject for breach of warranty,[22] that the Indian Contract Act did not distinguish between conditions and warranties,[23] and that the Uniform Sales Act permitted rejection for breach of warranty.[24])

Perhaps the biggest fear is that the codification of just one branch of case-law will inhibit the development of new concepts at the borders, and in particular the no-man's-land between contract and tort. It is of course difficult to see how any codification of the law of misrepresentation can fail to cover the tortious aspects of the subject in dealing with—and, one hopes, draining—the present morass of fraudulent misrepresentation, negligent misrepresentation at common law, negligent misrepresentation by statute, non-negligent, non-fraudulent misrepresentation where rescission is still possible, and non-negligent, non-fraudulent misrepresentation where rescission is not possible. But what of the American developments? These include the tort-warranty, where a form of strict

[19] Austin, *op. cit.*, 3rd ed., p. 697.
[20] See Diplock L.J. in *Hong Kong Fir Shipping Co. Ltd.* v. *Kawasaki Kisen Kaisha Ltd.* [1962] 1 All E.R. 474, 487.
[21] [1962] 1 All E.R. 474.
[22] Cl. 60, which after redrafting became s. 53 of the Act. But *cf.* cl. 19 of the 1889 Bill, now s. 11 of the Act.
[23] Indian Contract Act 1872, s. 118 (now repealed). See also s. 117.
[24] s. 69.

liability has been developed not bounded by privity of contract,[25] and tort liability for unreasonable offers, even if they have never been accepted.[26] If the contract side of the frontier is too strictly patrolled, reconnaissance parties into adjoining territory may become impossible.

(e) *Accretion of case-law*

It may be that on the day the code is passed one can look at the Queen's Printer copy of the statute and say: "That, and that alone, is the English law of contract." But there is no reason to think that lawyers will stop regarding judicial decisions as binding authorities, whether on a common law rule, an ordinary statute, or a codifying statute, and once the judges start to interpret the code it will no longer be possible to rely on the statutory words alone. Thus recent books on the law of sale of goods, though based substantially on the Sale of Goods Act 1893, refer to between 400 and 850 cases decided since the Act was passed.[27] In this way the accessibility of the law, to the profession and to the public, is inevitably marred.

This is unavoidable. Neither judicial nor academic commentary on the code can be prevented. Attractive though the idea may seem, it would not be possible to emulate the *c. Deo auctore* which forbade commentaries on Justinian's *Digest* (and which was not long observed).[28] The approach of Cardozo J. is more realistic: ". . . code is followed by commentary and commentary by revision, and thus the task is never done." [29]

Conclusion

It would no doubt be attractive to end this paper with a judicious weighing in the balance, an attempt to conclude whether the advantages of codification outweigh its difficulties. Apart from my natural desire not to commit myself when I may be proved wrong within the next two hundred years, this would not be profitable.

This is because a great deal depends on the quality of the code and the spirit in which it is administered by the courts. Pope's aphorism has sufficient truth in it to turn the scales:

[25] See (among much literature) F. Kessler, "Products Liability" (1967) 76 Yale L.J. 887.

[26] *Channel Master Corpn.* v. *Aluminium Sales Inc.* 4 N.Y. 2d 403, 151 N.E. 2d 833 (1958). See K. N. Llewellyn, *The Common Law Tradition, Deciding Appeals* (1960), p. 478.

[27] Chalmers' *Sale of Goods Act*, 15th ed.: 868 cases; Atiyah, *op. cit.*, 3rd ed.: 488 cases; Fridman, *op. cit.*: 490 cases.

[28] Carolina once "absolutely prohibited" any form of "comments and expositions on any part" of the law (though I am not clear whether this applied to judges): "The Fundamental Constitutions of Carolina," art. 80, in 5 *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws* (ed. F. Thorpe) 2783 (1909), cited Mellinkoff, *The Language of the Law*, p. 209.

[29] Cardozo, "A Ministry of Justice" (1921) 35 Harv.L.Rev. 113.

" For Forms of Government let fools contest;
Whate'er is best administered is best." [30]

It is a striking fact that codification was not categorically opposed by any of the judges who spoke in the Lords debates, and indeed the pleasure which judges take in criticising the parliamentary draftsmen, their professional partners in the creation of law, suggests that they would look forward to meeting a new code in combat. The motivation may perhaps be that which an eminent barrister once gave Mr. Justice Holmes in justifying the distinction between barristers and solicitors: " if the law was to be practised somebody had to be damned, and he preferred that it should be somebody else." [31]

If the new code is well done lawyers will be in the Lord Chancellor's debt for generations, and like the first Lord Chancellor Gardiner he will be in office a hundred years after his death.[32] If it is not well done, Sir Frederick Pollock's sane and balanced comment will offer a crumb of comfort to the Chancellor and his Law Commission: " It is strange how little harm bad codes do." [33]

AUBREY L. DIAMOND.*

[30] Essay on Man, Epistle III, 306–304.
[31] O. W. Holmes, Jr., "Law in Science and Science in Law" (1899) 12 Harv.L.Rev. 443, 460.
[32] Stephen Gardiner, Bishop of Winchester, was Lord Chancellor in Mary's reign (1553–54): see Holdsworth, *5 History of English Law*, pp. 5, 218, 224. Bacon wrote to King James to urge the King to support his law reform proposal: " as bishop Gardiner said in a bad sense that he would be bishop an hundred years after his death, in respect of the long leases he made: so lawgivers are still kings and rulers after their decease, in their laws ": Spedding, *op. cit.* Vol. VI, p. 64. Campbell preferred the spelling " Gardyner " (*Lives of the Lord Chancellors*) (2nd ed., 1846), Vol. II, Chaps. XL–XLI. Gardiner appears as Bishop of Winchester in Shakespeare's *Henry VIII*.
[33] *Holmes-Pollock Letters* (2nd. ed., 1961), Vol i, p. 268 (letter from Pollock to Holmes, July 18, 1918).
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APPENDIX

A note on method

Tables 1 and 2 are based on an analysis of the cases reported in the *All England Law Reports* for 1965. Although those reports purport to list the authorities cited by the court, and sometimes add a list of authorities cited

TABLE 1

Authorities cited in cases reported in *All England Law Reports* for 1965, by number of authorities per reported case

Authorities per reported case	Volume 1		Volume 2		Volume 3		Total for 1965	
	Reported cases	per cent.	Reported cases	per cent.	Reported cases	per cent.	Reported cases	per cent.
82			1[1]				1	
80					1[2]		1	
66	1[3]						1	
53			1[4]				1	
49	1[5]						1	
45			1[6]				1	
43			1[7]				1	
42					1[8]		1	
38					2		2	
33	1		1				2	
30	1				1		2	
29	2						2	
27			2		2		4	
26	1		1		4		6	
25	1						1	
24	2		2		1		5	
23	1						1	
22			3		1		4	
21	1		1				2	
20	4		4		1		9	
20 or more	16	10·3	18	12·4	14	10·4	48	11·1
10–19	33	21·3	23	15·9	26	19·4	82	18·9
3–9	71	45·8	62	42·8	63	47·0	196	45·1
1–2	23	14·8	26	17·9	23	17·2	72	16·6
0	12	7·8	16	11·0	8	6·0	36	8·3
Total reported cases	155	100	145	100	134	100	434	100
Total cited authorities	1,367		1,294		1,214		3,865[9]	
Average number of authorities per reported case	8·8		8·9		9·1		8·9	

Notes: [1] *National Provincial Bank* v. *Ainsworth* [1965] 2 All E.R. 472, H.L.
[2] *In the Estate of Fuld, decd. (No. 3)* [1965] 3 All E.R. 776, P.D.A.
[3] *John Carter (Fine Worsteds) Ltd.* v. *Hanson Haulage (Leeds) Ltd.* [1965] 1 All E.R. 113, C.A.
[4] *Morris* v. *C.W. Martin & Sons Ltd.* [1965] 2 All E.R. 725, C.A.
[5] *Ward* v. *James* [1965] 1 All E.R. 563, C.A.
[6] *R.* v. *Paddington Valuation Officer* [1965] 2 All E.R. 836, C.A.
[7] *Esso Petroleum Co. Ltd.* v. *Harper's Garage (Stourport) Ltd.* [1965] 2 All E.R. 933, Q.B.D.
[8] *Regent Oil Co. Ltd.* v. *Strick* [1965] 3 All E.R. 174, H.L.
[9] See Table 2.

in argument but not referred to in the judgments, Mr. L. C. B. Gower of the Law Commission pointed out to me that those lists are not complete. Each of those reported cases was therefore looked up also in the *Weekly Law Reports, the Law Reports, Lloyd's List Law Reports* and *Tax Cases* to see if it was reported in any or all of those series, and a comparison made of the authorities there referred to.

For example, *In the Estate of Fuld, decd.* (*No.* 3) is reported at [1965] 3 All E.R. 776. That report lists eight authorities referred to in the judgment. But the report of the same case at [1966] 2 W.L.R. 717 shows that in argument a further sixty-two authorities were cited, while the report of the judgment covers more ground than that in the *All England Law Reports* and introduces a further ten cases, making a total of eighty cases cited in judgment or argument. These eighty authorities were then classified as to date. Again, *John Carter* (*Fine Worsteds*) *Ltd.* v. *Hanson Haulage* (*Leeds*) *Ltd.* is reported at [1965] 1 All E.R. 118, where twenty-five authorities are referred to. But the report of the same case at [1965] 2 W.L.R. 558 shows that forty-one further authorities were cited, a total of sixty-six. I am most grateful to Mr. G. A. Lord for his painstaking work on the cases.

The authorities cited in the fifty-six contract cases in the period 1957–66 dealt with in Table 8, and in the thirty cases on codified branches of the law for the same period dealt with in Table 4, were counted and classified in the same way.

In each of these Tables, the reference to cited authorities includes cases referred to in argument as well as those cited in the judgments, so far as the reports mentioned above give this information.

TABLE 2

Authorities cited in cases reported in *All England Law Reports* for 1965, by date

Dates of cited authorities	Number of cited authorities		per cent.	
Y.B. (1470)	1		—	
1500–1599	7	67	0·2	1·7
1600–1699	16		0·4	
1700–1799	43		1·1	
1800–1849	171	435	4·4	11·2
1850–1875	264		6·8	
1876–1899	404		10·5	
1900–1919	441	1,193	11·4	30·9
1920–1945	752		19·5	
1946–1959	1,032	1,766	26·7	45·7
1960–1965	734		19·0	
Total authorities cited	3,865		100	

TABLE 3

Authorities cited in 56 cases on the law of contract, 1957–1966, by date

Dates of cited authorities	Number of cited authorities	per cent.
1600–1699	7 } 39	0·7 } 4·0
1700–1799	32	3·3
1800–1849	69 } 174	7·1 } 18·0
1850–1875	105	10·9
1876–1899	130	13·4
1900–1919	162 } 372	16·7 } 38·4
1920–1945	210	21·7
1946–1959	206 } 253	21·5 } 26·2
1960–1966	45	4·7
Total authorities cited	968	100
Reported cases	56	
Average number of authorities per reported case	17·3	

TABLE 4

Authorities cited in 30 cases on codified branches of the law, 1957–1966, by date

Dates of cited authorities	Number of cited authorities	per cent.
1700–1799	3	0·8
1800–1849	19 } 68	4·9 } 17·5
1850–1875	49	12·6
1876–1899	64	16·5
1900–1919	74 } 176	19·1 } 45·4
1920–1945	102	26·3
1946–1959	52 } 77	13·4 } 19·8
1960–1966	25	6·4
Total authorities cited	388	100
Reported cases	30	
Average number of authorities per reported case	12·9	

TABLE 5

Social surveys

A. Survey prepared by the Government Social Survey and carried out by National Opinion Polls Ltd. for the Committee on the Age of Majority, July-September 1966.

The survey was based on a sample of men and women aged 16–24 in England and Wales. Short details will be found in the Report of the Committee on the Age of Majority (1967, Cmnd.3342), pp. 201 and 204.
Among the questions asked were the following:

1. How old do you have to be before you can legally sign your own hire-purchase agreement—for a scooter or a record-player?
2. How old do you have to be before you can legally buy or sell your own house?
3. How old do you have to be before you can legally marry without having to get permission from your parents or a court?
4. How old do you have to be before you can legally marry at all—that is, providing you can get permission from your parents or a court?
5. How old do you have to be before you can legally drive a car on the public roads?
6. How old do you have to be before you can legally buy yourself an alcoholic drink in a public-house?
7. If a man has sexual relations with a girl, and the girl is below "the age of consent," he can be prosecuted. Do you know what this age is?

The answers received are shown in the following table.

	Qn. 1 Hire-purchase	Qn. 2 House purchase	Qn. 3 Marriage without consent	Qn. 4 Marriage with consent	Qn. 5 Drive car	Qn. 6 Buy drink	Qn. 7 Age of consent
	percentages						
Any age (no restriction)	0·2	1·1	–	1·4	–	–	0·4
15 or under	–	–	–	2·0	–	–	17·4
16	3·1	1·3	3·1	80·2*	5·0	2·5	62·1*
17	1·7	–	0·3	2·7	72·5*	1·3	1·8
18	8·5	1·9	8·9	9·2	21·0	93·6*	3·0
19	0·1	0·1	0·3	0·3	0·2	0·7	0·1
20	0·1	0·1	0·3	0·3	0·2	0·1	0·1
21	82·2*	79·9*	85·5*	2·1	0·4	0·7	1·6
22 or over	0·3	5·5	0·5	–	–	0·1	–
Don't know	3·9	10·2	1·2	1·9	0·6	0·9	13·6

Note: columns of percentages may not total 100 per cent. on account of rounding off to one place of decimals.
* Correct answer.

B. Survey carried out by Social Surveys (Gallup Poll) Ltd. for the Consumer Council, August 1964.
The survey was based on a sample of men and women aged 16 and over in Great Britain.
Among the questions asked were the following:

If something is bought without a written guarantee, who do you think is responsible for putting it right if anything goes wrong?

The answers received were as follows:

	per cent.
Purchaser	31
Manufacturer	34
Retailer	22
No one	6
Don't know	7

CONTRACTUAL CO-OPERATION AND THE IMPLIED TERM

ONE finds occasional reference in the contract textbooks and cases to a duty of "co-operation" which rests on each party to a contract: a duty, as J. F. Wilson has put it, to "facilitate performance of the contract." [1] An examination of this concept, and its limits, would seem worthwhile for two reasons. First, it will cast light on just how close a tie the contractual relation is: on how far English law is away from the Roman concept of "good faith" in contractual dealings.[2] This dissolves really into an inquiry as to how far one party will be allowed to put his own selfish interests ahead of those of his contractual partner. For when a party does something which interferes with the performance of the contract, or the benefit the other party hoped to get from it, his action is seldom contumacious; he has simply decided that some other interest of his own deserves first preference. Secondly, it ought also to cast light on that difficult but important topic, the criteria by which the courts imply terms in contracts. For a "duty of co-operation" being seldom expressly provided for, such a duty will normally be pleaded as an "implied term" of the contract: the convention that the parties alone can create duties in contract will dictate that.

"Co-operation" is a vague term, and can be used to cover a wide range of situations. However, the topic may be divided into two main parts for convenience of examination. The first deals with A's interference with B's enjoyment of the subject-matter of the contract, and the second with A's interference with the actual performance of the contract promises.

A. INTERFERENCE WITH ENJOYMENT OF SUBJECT-MATTER

It may be said confidently enough that the law recognises a general principle that if one man contracts to confer a benefit on another, he must not do an act which substantially detracts from the other's enjoyment of that benefit. This would be virtually to take away with one hand what one had given with the other. The principle has been described by high authority as one of "common honesty," [3] but no doubt it is reinforced by factors of public policy as well: business could not be carried on smoothly if a tradesman could not rely on getting the full benefit from his contract.

[1] *Principles of the Law of Contract*, p. 262. See also *Sutton and Shannon on Contracts*, 6th ed., p. 108 and *Mona Oil Equipment* v. *Rhodesia Railways Ltd.* [1949] 2 All E.R. 1014, 1018, *per* Devlin J.

[2] See Powell, "Good Faith in Contracts" (1956) 9 *Current Legal Problems* 16.

[3] *Harmer* v. *Jumbil (Nigeria) Tin Areas Ltd.* [1921] 1 Ch. 200, 225, *per* Younger L.J. See also Lord Macnaghten in *Trego* v. *Hunt* [1896] A.C. 7, 25.

It is doubtful, however, whether this principle is entitled to the name of a " rule of law " which attaches to all contracts. It is rather an inarticulate premise which underlies legal reasoning, and which may appear in a variety of guises. In two fields in particular it has crystallised into a well-known rule, the rule that one must not " derogate from one's grant." One of these is the contract for the sale of a business, where it is well established that the vendor must not later solicit his old customers himself, thus effectually destroying the real object of the sale.[4] The other is the contract for the grant of an interest in land, whether a conveyance or a lease, where it is well established that the grantor must not use land retained by him " in such a way as to render the land unfit or materially less fit " for the purpose for which the grantee wants to use it.[5] A common example is the grant of land for building, where the grantor will be enjoined from building on his own land in such a way as to obstruct the lights of the grantee; [6] another is the grant of a lease for the purpose of carrying on a trade, in which case the grantor will not be allowed to indulge in any activity which substantially interferes with the trade.[7]

But these are just the best-known illustrations of the operation of the principle. They are instances where there have been enough precedents for one to be able to define the obligation at least roughly, and to make it the natural thing to refer to this obligation as a " rule of law." The principle also appears as a settled rule, but under a different appellation, in what is known as the " implied covenant for quiet enjoyment " in the law relating to leases.[8] This " implied covenant " has in the course of centuries of litigation been fairly well defined; it is nothing more nor less than a rule of the common law. Its boundaries overlap quite substantially with those of the obligation not to derogate from grant, and in some cases either may be pleaded.[9]

The principle has solidified in other specific cases as well. For instance, it may now be treated as a rule of law that a seller of

[4] See especially *Labouchere* v. *Dawson* (1872) L.R. 13 Eq. 322; *Trego* v. *Hunt* [1896] A.C. 7; *Curl Bros. Ltd.* v. *Webster* [1904] 1 Ch. 685.

[5] The quotation is from *Browne* v. *Flower* [1911] 1 Ch. 219, 226, *per* Parker J.

[6] *Palmer* v. *Fletcher* (1663) 1 Lev. 122; *Roswell* v. *Prior* (1701) 6 Mod.Rep. 116; *Myers* v. *Catterson* (1889) 43 Ch.D. 470; *Phillips* v. *Low* [1892] 1 Ch. 47. *Cf. Birmingham, Dudley & District Banking Co.* v. *Ross* (1888) 38 Ch.D. 295; *Quicke* v. *Chapman* [1903] 1 Ch. 659.

[7] *Harmer* v. *Jumbil (Nigeria) Tin Areas Ltd.* [1921] 1 Ch. 200; *Aldin* v. *Latimer Clark, Muirhead & Co.* [1894] 2 Ch. 437; *Cable* v. *Bryant* [1908] 1 Ch. 259. *Cf. Lyttleton Times* v. *Warners* [1907] A.C. 476; *Robinson* v. *Kilvert* (1889) 41 Ch.D. 88. For a discussion of the principle, see Megarry and Wade, *Law of Real Property* (3rd ed., 1966), pp. 683 *et seq.*; Elliott (1964) 80 L.Q.R. 244.

[8] For useful surveys of this implied covenant, see Woodfall, *Landlord and Tenant*, 26th ed., Chap. 12, s. 11; Fox, *Landlord and Tenant*, 8th ed., p. 182 *et seq*; Hill and Redman, *Law of Landlord and Tenant*, 14th ed., p. 190 *et seq.*

[9] See *Malzy* v. *Hichhols* [1916] 2 K.B. 308; *Robinson* v. *Kilvert* (1889) 41 Ch.D. 88.

shares must not prevent his buyer from registering his transfer,[10] and that the assignor of a debt must not release the debtor from any security.[11] In both these cases the party would be substantially destroying what he had given.

Even in this group of well-settled rules it is common to refer to the duties as "implied terms" of the contract. This is just a manifestation of the practice, existing since at least the mid-nineteenth century, to refer all duties on the parties to a contract to the wills of those parties themselves.[12] But in their origins these rules were not supposed to have anything to do with the parties' wills at all: they were quite openly admitted to be creations of the law. The duty not to derogate from grant on the sale of a business had its beginnings in equity, where the cases were decided on the simple ground that the defendant's conduct had been "fraudulent" or "unconscionable."[13] The origins of the obligation of the grantor of land are to be found in the old action on the case; it was just an actionable wrong to stop or obstruct lights when you had sold land for building purposes.[14] Yet the name "implied term" has become firmly attached to these duties, and with it the suggestion that the question is really just one of interpreting "intention."

But so far one has dealt only with well-ingrained illustrations of the principle. It also makes frequent appearances in cases where there is no precedent directly in point, and it is alleged that a duty arises on the facts of the particular case. The terminology of "implied term" and "parties' intentions" is usually relied on to justify the imposition of this unexpressed duty. So, to take two examples from shipping law, it has been held that the owner of a chartered vessel must not change her flag during the currency of the charter,[15] and that he must not load her with more coal than necessary, with the result that the charterer has to pay a large sum to have her lightened to pass over a bar.[16] In both cases the owner's act rendered the charterer's enjoyment of the contractual benefit much less lucrative and more difficult than he was entitled to expect. It simply cast obstructions in the way of proper enjoyment.

However, when one comes to examine the limits of this "principle" one sees for the first time that "common honesty" is not the overriding principle in English law that it seems to have been in Roman law. The common law seems to have been tailored for hard businessmen. It is not prepared to limit party A to the extent that he must place party B ahead of himself all the time. Even the established rules about derogation from grants are not

[10] *Hooper* v. *Herts* [1906] 1 Ch. 549.
[11] *Gerard* v. *Lewis* (1867) L.R. 2 C.P. 305; *Aulton* v. *Atkins* (1856) 18 C.B. 249.
[12] See Lord Radcliffe in *Davis* v. *Fareham U.D.C.* [1956] A.C. 696, 728.
[13] See *Shackle* v. *Baker* (1808) 14 Ves.Jun. 468; *Cruttwell* v. *Lye* (1810) 17 Ves.Jun. 335.
[14] See *Palmer* v. *Fletcher* and *Rosewall* v. *Prior*, *supra*, note 6.
[15] *Isaacs* v. *McAllum* [1921] 8 K.B. 877.
[16] *Darling* v. *Raeburn* [1907] 1 K.B. 847.

severe and all-embracing; and a party who tries to plead an unprecedented duty arising from the special facts will more than likely have his claim rejected. In other words, by no means every interference with party B's contractual benefit is a breach.

The following points may be made.

(1) The principle seems to have been restricted to prohibiting acts which harm the enjoyment of the other party. It does not go so far as to require one party actually to perform positive acts to further that other's enjoyment. It is no breach of contract simply to sit back and watch the other party running into more difficulties than he bargained for. By way of example, a licensor, while he is bound not to destroy the subject-matter of the licence, need not take active steps to repair it if it falls into a state of decay[17]; a lessor is not, in the absence of an express covenant, bound to repair the demised premises.[18] In line with the same policy, a party is normally under no obligation to stop the actions of others coming into conflict with the grantee's interests. A landlord, for instance, is under no obligation to his lessee because another tenant in the same block causes an interference with the former's trade.[19]

A striking case where such a duty was pleaded—and rejected by the court on the particular facts of the case—was *Re Cadogan and Hans Place Estate Ltd.*[20] A contracted with B Company to pave a roadway for them, himself taking a lease of the land concerned until it could be dedicated. The plan given to him showed the proposed roadway to be of the legal width; in fact this was erroneous, although the defect could have been cured had the company bought a small additional piece of land. This it refused to do, and it was held that it need not, although the builder in whom the land was vested was by law bound to maintain it in perpetuity.[21]

(2) But even a positive interference is not always a breach. It has been established—mainly in non-derogation cases—that to be a breach an interference must be "substantial."[22] However, that is a very vague and flexible criterion. The courts seem to be reluctant to find that it has that character if all a man has been doing is to indulge his own business and profit-making interests. The cases point to a policy of something rather like free enterprise: they

[17] *Pomfret* v. *Ricroft* (1669) 1 Wms.Saund. 321.
[18] *Arden* v. *Pullen* (1842) 10 M. & W. 321; *Sleafer* v. *Lambeth B.C.* [1960] 1 Q.B. 43.
[19] *Port* v. *Griffith* [1938] 1 All E.R. 295; *Malzy* v. *Hichhols* [1916] 2 K.B. 308
[20] (1895) 11 T.L.R. 477.
[21] There are two cases where positive conduct is required in situations which *may* be said to come under this head. A landlord must take care to see that the tenant is not harmed by a part of the premises which the landlord retains in his own possession and control: *Cockburn* v. *Smith* [1924] 2 K.B. 119. An impresario who hires a theatre performer at a salary must give him a reasonable opportunity to appear: *Feakins* v. *Montgomery* (1863) 28 Beav. 22.
[22] *O'Cedar Ltd.* v. *Slough Trading Co. Ltd.* [1927] 2 K.B. 123; *Kelly* v. *Battershell* [1949] 2 All E.R. 830.

suggest that a man should not be prohibited from carrying on business freely just because one of the persons with whom he deals is thereby caused some damage.

So, while the vendor of a business must not actively solicit old customers, there is nothing to stop him setting up a new business of a similar kind in the same area.[23] But perhaps the best illustrations are two cases where the plaintiff sought to imply a term on the particular facts. In *Dare* v. *Bognor U.D.C.*[24] it was held that a council which had hired 500 chairs to the plaintiff which he was to let out to the public for a band concert could nevertheless provide free chairs for the same concert. They were entitled to enhance the reputation of their seaside administration at the plaintiff's expense. In *Livock* v. *Pearson Bros.*[25] the defendant manufacturers sold goods to the plaintiff retailers on condition that the plaintiffs should not resell them to the public at less than a specified price. Some time later the defendants themselves sold direct to the public at a lower price. It was held that the loss to the plaintiffs could not be recouped in damages.[26]

The balance which the court has to maintain is a slender one: between the plaintiff's right to the expected profit from his contract on the one hand and the defendant's right to carry on his business at a profit on the other. The balance seems to have been weighted somewhat in favour of the defendant.

(8) Another aspect of the flexibility of the concept " substantial interference " can be seen in the cases of derogation from the grant of land. This duty not to " derogate " restricts a man in the free exercise of the rights of ownership of land, and there is evidence that this is something the courts are very reluctant to do. It seems that one of the factors they have taken into account in determining whether the interference is " substantial " is whether the grantee's interest is really important enough to merit the restriction of the other's normal rights. So, while a man's right to live on his land without interference may be sufficient to stop his vendor neighbour from building, the courts are much less ready to give equivalent protection to something like a grant of sporting rights. In fact, it has been held that the grantee of a right to shoot rabbits on certain land has no right to complain if the owner lays a railway across it,[27]

[23] *Trego* v. *Hunt* [1896] A.C. 7. This case affirmed the position established in *Labouchere* v. *Dawson* (1872) L.R. 13 Eq. 322. The cases vacillated from this time until *Trego* v. *Hunt*. Some favoured a fairly severe restriction on the vendor (see especially *Ginesi* v. *Cooper* (1880) 14 Ch.D. 596); others favoured a "free-trade" approach which even allowed the vendor to solicit customers (see *Pearson* v. *Pearson* (1884) 27 Ch.D. 145). A middle course of the *Trego* v. *Hunt* kind was adopted in *Leggott* v. *Barrett* (1880) 15 Ch.D. 306.

[24] (1912) 76 J.P. 425; 28 T.L.R. 489.

[25] (1928) 33 Com.Cas. 188.

[26] See also *O'Cedar Ltd.* v. *Slough Trading Co. Ltd.* [1927] 2 K.B. 123 and *Robinson* v. *Kilvert* (1889) 14 Ch.D. 88.

[27] *Bird* v. *S.E. Railway* (1865) 19 C.B.(N.S.) 268.

or cuts trees or furze,[28] thus disturbing the game. The right to make a profit out of one's property is evidently taken to be more deserving of protection than a right to shoot rabbits.[29] Yet a contract is a contract, and even a grant of sporting rights must not be destroyed almost completely; so actually to sell some of the land in question for building, thus excluding the sporting tenant completely, is a breach of contract.[30]

So the courts have refused to give the status of a rule of law to the principle that a party must not interfere with the other party's enjoyment of his contract. The concretisations of that principle are very limited in scope,[31] or are themselves very vague and flexible, and able to give way readily in any case: the duty not to derogate from a grant of land is the best example of that. The principle is really a moral one which can be defeated by other factors. The headnote to the report in the *Dare* case is a fair statement of the court's attitude in cases of the kind:

> "It cannot be laid down universally as applying to every contract that whenever something is done by a grantor which has the effect of preventing or reducing the profits which the grantee reasonably expects to get out of the contract there is a good cause of action. Each contract must be looked at and considered in itself." [32]

It may be suggested that each case involves a careful weighing of three considerations: the substantiality of the interference, the importance of the grantee's interests and the social desirability that the defendant should be allowed to act as he has done. In respect of the last of these three considerations, the courts have demonstrated that they regard freedom of trade and competition and the right to make a profit out of one's property as of paramount "social desirability." A man cannot be expected to let his own business interests suffer just because he might by so doing make things a little less profitable for the other party to one of his contracts.

B. Interference with Performance of Promises

One turns now to a different question, although one which involves many of the same considerations. This is the question of the right of a party, not to the enjoyment of the other's performance,

[28] *Gearns* v. *Baker* (1875) L.R. 10 Ch. 355; *Jeffryes* v. *Evans* (1865) 19 C.B. (N.S.) 246; *Dick* v. *Norton* (1916) 85 L.J.Ch. 628. See also *Pattison* v. *Gilford* (1874) L.R. 18 Eq. 259.

[29] Note James L.J. in *Gearns* v. *Baker* at p. 357: "It is preposterous to suppose that a man who grants a shooting lease for 21 years is to be dictated to by this court as to whether he shall cut down a tree or remove a coppice, because by so doing he would be driving away the hares."

[30] *Pocock* v. *Best* [1931] 1 K.B. 1.

[31] *e.g.*, the rule that a vendor of a business must not solicit old customers.

[32] The *Times Law Report* headnote, 28 T.L.R. 489.

but to perform his own part free from interference.[33] For the purposes of discussion it will be convenient to divide the field into two parts, although in fact it is probably not possible to draw an absolutely firm line between them.[34] The cases will be classified according to whether party B is being blamed for having done a positive act obstructing party A, or whether he is being blamed for sitting back and not actively helping. The distinction, then, is between a duty not positively to obstruct and a duty to co-operate actively.

Duty not to Obstruct: Total Prevention

We are concerned here with the situation where party B has by his conduct made it impossible for party A to perform a part of his contract; the question is how far this prevention is a wrongful act.

One aspect of the topic may be disposed of simply. If B forces A into technical breach of contract by his conduct, he will not be allowed to sue for damages or to enforce a forfeiture or penalty clause in the contract itself. This is a sort of estoppel: a man will not be heard to blame another for something brought about by himself. That is perhaps best illustrated by a group of building cases which hold that a building owner is disentitled to enforce a clause providing for liquidated damages for exceeding a certain time limit if the delay was caused by the owner himself.[35]

These are simple and reasonable cases. But they do raise a point which causes much more difficulty in other contexts. It is that these decisions are in no way concerned with whether B, the preventer, has committed a breach of contract himself by his act of prevention. Indeed, in some of the cases his act, although making it unreasonable that he should enforce the contract against A, was clearly not itself an actionable breach.[36]

A more difficult problem arises when A, the prevented, is suing B, the preventer. The question of how far the prevention is "a

[33] See, for a discussion of this problem, Stoljar, "Prevention and Co-operation in the Law of Contract" (1958) 31 Can.B.R. 231; Patterson, "Constructive Conditions in Contracts" (1942) 42 Col.L.R. 908.

[34] To illustrate the (at times) hazy nature of the distinction, see *City of Dublin Steam Packet Co.* v. *R.* (1908) 24 T.L.R. 798, where the question was the extent of the port facilities to which a shipping company was entitled. Cozens Hardy M.R. put the answer in this way: "In my opinion the implied obligation imposed by the contract upon the Crown was, if put in a positive form, to allow all such facilities at the pier as are reasonably necessary to enable the company to perform their obligation under the contract, or, if put in a negative form, not to use the pier or allow the pier to be used so as substantially to prevent the company from performing their obligations under the contract." See also *Doe* v. *Hunt* (1836) 1 M & W. 690.

[35] See especially *Holme* v. *Guppy* (1838) 3 M & W. 387; *Roberts* v. *Bury Improvement Commissioners* (1870) L.R. 5 C.P. 310; *Russell* v. *Sa Da Bandeira* (1862) 12 C.B.(N.S.) 149; *Lodder* v. *Slowey* [1904] A.C. 442; *Amalgamated Building Contractors* v. *Waltham U.D.C.* [1952] 2 All E.R. 452. Note the discussion by Stoljar in (1958) 31 Can.B.R. 231.

[36] See particularly *Dodd* v. *Churton* [1897] 1 Q.B. 562 and note also *Worcester College* v. *Oxford Canal Navigation Co.* (1911) 81 L.J.Ch. 1.

wrongful act " is complicated by the number of ways in which the matter may be pleaded. Not all of these are concerned with the question of whether B's conduct is a breach of contract, and the relation between them is by no means certain. The question may arise in the following ways:

(i) A may be suing B for failing to perform his main contractual promise. B alleges his performance never became due, because A did not perform a condition precedent. A alleges that B cannot rely on that, for he prevented performance. This is again to use the preventing conduct as a kind of estoppel. This was a common mode of pleading in early times, when lawyers tended to be more preoccupied with ideas of " condition " than they are now.[37]

(ii) B's act may, in addition to rendering A's performance impossible, " evince an intention " not to perform his own part, and A sues on this as a repudiation.[38]

(iii) A may be suing for a *quantum meruit*, he having been prevented from completing work already begun.[39]

(iv) A may be suing B for non-performance. B pleads that the contract has been frustrated. A alleges that this plea is bad because B himself brought about the frustrating act.[40]

(v) A may be suing B for having broken an implied term that he would not prevent further performance by A. After *Hochster* v. *De la Tour*,[41] establishing that a contract can be broken before the

[37] Originally it was taken to quite an unreasonable extent. For instance, if A promised to pay B £100 if he built a house, then prevented B from building, B could apparently sue for the full £100, and A would be estopped from alleging that the condition was not fulfilled: *Peters* v. *Opie* (1671) 1 Ventr. 177. But this would give a man both the full contract price and his time and money, and this did not remain good law for long. (See *Colley* v. *Overseas Exporters* [1921] 3 K.B. 302.) Nevertheless throughout the 19th century one finds prevention relied on as an estoppel much more than one would today, provided that its application in that way did not amount blatantly to giving a man more than he was entitled to : see, *e.g. Cleary* v. *McAndrew* (1868) 9 L.T. 550; *Bradley* v. *Benjamin* (1877) 46 L.J.Q.B. 590; *Lott* v. *Outhwaite* (1893) 10 T.L.R. 76. But nowadays this form of pleading is restricted to cases where the " prevented " condition is an act of a formal ministerial character (such as tendering a transfer) which does not amount to the main part of the consideration. See, *e.g.*, *Tiberghien Draperie Societa* v. *Greenberg* [1958] 1 Lloyd's Rep. 799, and note the comments of Hill J. in *The Valsesia* [1927] P. 115, 119 and of Devlin J. in *Mona Oil Equipment Co. Ltd.* v. *Rhodesia Railways Ltd.* [1949] 2 All E.R. 1014, 1017.

[38] See the classic definition of " repudiation " in *Shaffer (James) Ltd.* v. *Findlay Durham & Brodie* [1953] 1 W.L.R. 106. See the use of repudiation in this way in *Cory* v. *London Corporation* [1950] 2 All E.R. 584. In the Court of Appeal " implied term " was relied on: see [1951] 2 K.B. 476.

[39] See *Planché* v. *Colburn* (1831) 5 C. & P. 58; 8 Bing. 14; *De Bernardy* v. *Harding* (1853) 8 Ex. 822; *Prickett* v. *Badger* (1856) 1 C.B.(N.S.) 296; *Goodman* v. *Pocock* (1850) 15 Q.B. 576.

[40] This is the doctrine of " self-induced frustration." See *Cheshire and Fifoot on Contract*, 6th ed., pp. 487 *et seq.* and McElroy and Williams, *Impossibility of Performance*, p. 288 *et seq.* The leading cases are *Maritime National Fish Co.* v. *Ocean Trawlers Ltd.* [1935] A.C. 524 and *Constantine S.S. Co. Ltd.* v. *Imperial Smelting Corporation Ltd.* [1942] A.C. 154.

[41] (1853) 2 E. & B. 678.

due date for performance, this has become a more common mode of proceeding than (i).[43]

(vi) A may be suing B for having so altered an existing state of circumstances that performance by both parties, if carried out, would be something quite different. A will in such a case rely on the "implied term" formulated by Cockburn C.J. in *Stirling* v. *Maitland and Boyd*:

> "If a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances under which alone the arrangements can be operative."[44]

In only three of these cases, (ii) (v) and (vi), is B's conduct really alleged to be a breach of contract in the normal sense: *i.e.*, an act for which damages are recoverable. In (iii) the remedy sought is not damages, and in (i) and (iv) B's conduct is being relied on only as depriving B of a defence otherwise open to him. It is anything but clear just how far the boundaries of these three situations are also the boundaries of breach. Acts giving rise to an estoppel and acts amounting to a breach have never been necessarily coincidental (although since estoppel is an *aid* to a cause of action the two are not very far apart)[44]; there is some evidence (although slight and out of line with some academic opinion) that self-induced frustration of contract is not necessarily a breach of itself[45]; and there is no inconsistency about saying that a man may be liable to pay for work done by another although he is not liable in damages for breach.

So the problem of how far prevention is "not allowed" by the law is complicated by all this. We can only say that one does not find any cases under heads (i) to (iv) where the point was even discussed whether prevention inevitably has the effect in question. There is more of interest under heads (v) and (vi), where we find cases suggesting that prevention is not always a breach of contract: that sometimes one party will be *allowed* to prevent the other party from performing his part, even if that means that he

[43] By way of example, see *Cory* v. *London Corporation* [1951] 2 K.B. 476; *Luxor (Eastbourne) Ltd.* v. *Cooper* [1941] A.C. 108.

[44] (1864) 5 B. & S. 840, 852.

[44] *e.g.*, before anticipatory repudiation was allowed to be a breach by *Hochster* v. *De la Tour* it could serve as an estoppel: see *Ripley* v. *McClure* (1849) 4 Ex. 345. Moreover, the use of prevention as an estoppel in this context is very close to its use in estopping the preventer alleging the other party is in breach. (See above p. 896.) Indeed, some authorities tumble both these situations into one proposition, that "he who prevents a thing from being done shall not avail himself of the non-performance which he has himself occasioned": see for instance *Chitty on Contract*, 22nd ed., General Principles, § 1255.

[45] See *Re Arthur* (1880) 14 Ch.D. 608, quoted by Glanville Williams in *Impossibility of Performance*, p 22. *Cf. Sutton and Shannon on Contracts*, 6th ed., p. 325.

is prevented from fulfilling the condition on which his right to counter-performance depends.

It is obvious that such cases will be rare. If B prevents A from carrying on with his part it is usually clear that he is not going to perform his part either; in other words this is a repudiation of his own express promise of performance, and a clear breach. Many cases recognise it as a general rule that prevention is a breach; the rule in *Stirling* v. *Maitland* clearly assumes so,[46] and we find wide dicta in other cases.[47] But there are a number of cases which do decide that the rule, although general, is not universal. It is notable that they are nearly all cases where the " implied term " has played an important part.

In one group of cases B carries on a certain activity —usually a business—and contracts that he will let A derive a certain benefit from this activity—a " subsidiary benefit " [48]—for a period of X years. In less than X years, B gives up the business, thus preventing A from earning his benefit. As early as *Rhodes* v. *Forwood* [49] in 1876 it was held that a cesser of business in a case like this by no means necessarily entails that there has been an actionable breach of contract.

The courts have treated the question in such cases as one of " construction " and " implied term." [50] Either the contract means that A is to be retained for a set period, in which case the question is whether one can imply a term that the business can be ended before that period; or else it means that A is to derive profit only from such activities as B actually carries on over X years, in which case the question is whether there is an implied term that he will continue activities for the whole X years. But sometimes the differences in wording which have been held to justify different constructions are far too slight [51]; sometimes in two very similar cases the terms proposed for implication have been opposites.[52] This artificial and rather unconvincing overlay covers

[46] *Supra*, note 42.

[47] See *Barque Quilpué Ltd.* v. *Brown* [1904] 2 K.B. 264, 271, *per* Vaughan Williams L.J.; *Harrowing* v. *Dupré* (1902) 7 Com.Cas. 157, 162, *per* Bigham J.; *Mutsenbecher* v. *La Aseguradora Espanola* [1906] 1 K.B. 254, 261, *per* Gorell Barnes J.; *Cory* v. *London Corporation* [1951] 2 K.B. 476, 484.

[48] These are the words of Scrutton J. in *Lazarus* v. *Cairn Line of Steamships* (1912) 17 Com.Cas. 107, 118.

[49] (1875) 1 App.Cas. 256.

[50] This was the approach of Scrutton J. in the *Lazarus* case (*supra*, note 48) which has been adopted consistently. Scrutton J. approved it himself in the Court of Appeal in *Reigate* v. *Union Manufacturing Co.* (*Ramsbottom*) *Ltd.* [1918] 1 K.B. 592, 604–605.

[51] Compare, for instance, *Rhodes* v. *Forwood* (1875) 1 App.Cas. 256 and *Turner* v. *Goldsmith* [1891] 1 Q.B. 544. In *Northey* v. *Trevilion* (1902) 18 T.L.R. 648 Phillimore J. said he thought the distinction between these two cases was " too fine."

[52] In *Brace* v. *Calder* [1895] 2 Q.B. 253 Lopes L.J. asked whether one could imply a term that the benefit could be ended in less than 2 years (p. 261); Lord Esher asked whether one could imply a term that the business would be carried on for 2 years (p. 259). Note also the quite opposite terms proposed by the first instance judge and the Court of Appeal in *General Publicity Services* v. *Best's Brewery* [1951] 2 T.L.R. 875.

up what in most cases is just the same situation: that B has agreed to allow A to derive a profit from his business over a period of X years, the question being whether B can suddenly terminate the arrangement. The holding that he can, means only that there are cases where it is allowable to prevent one party from performing a condition entitling him to payment, or to remove the fundamental basis of the contract.[53] The court's job in such cases is to balance two interests: B's right to give up a business which is proving a liability or on the sale of which he has a chance of making a profit, and A's right to keep on reaping benefits on the continued receipt of which he has perhaps been relying heavily.[54]

The same thing can be seen in the group of cases on the land agent's right to earn commission. It seems incontrovertible that, with only occasional doubts, it was thought before 1941 that a principal who prevented a land agent from earning his sale commission by withdrawing his authority or by refusing to complete a contract was as a general rule liable in damages.[55] *Luxor (Eastbourne) Ltd.* v. *Cooper* [56] established that that was not so. Each case, it said, had to be looked at on its own facts, and it was not to be held that the prevention was a breach unless one must necessarily imply a term to that effect. In other words, the presumption swung the other way: prevention is no breach in this sort of case unless circumstances lead to a contrary conclusion. It has been realised that the house-owner ought to have a free hand in getting the best deal he can.[57]

So these two groups of case make us wary of accepting as a

[53] The generality of the rule in *Stirling* v. *Maitland* was denied by Lord Hatherley in *Rhodes* v. *Forwood* (1876) 1 App.Cas. 256, 272 and Kay L.J. in *Hamlyn & Co.* v. *Wood & Co.* [1891] 2 Q.B. 488, 494–495. But it remains a prima facie general principle: see, for a recent example, *Shindler* v. *Northern Raincoat Co.* [1960] 1 W.L.R. 1038.

[54] See the rationale of the decisions on this branch of the law given by Phillimore J. in *Bauman* v. *Hulton Press Ltd.* [1952] 2 All E.R. 1121. See, however, *Powell on Agency* 2nd ed., 384. There are many cases on the point. See, for cases where the business owner was not liable for ceasing business: *Hamlyn & Co.* v. *Wood & Co.* [1891] 2 Q.B. 488; *L. French & Co. Ltd.* v. *Leeston Shipping Co. Ltd.* [1922] 1 A.C. 451; *White* v. *Turnbull Martin & Co.* (1898) 3 Com.Cas. 188; *Emanuel* v. *Compagnie Fermière de Vichy* [1899] W.N. 150; *McIntyre* v. *Belcher* (1863) 14 C.B.(N.S.) 654. And, for cases where he was, *General Publicity Services Ltd.* v. *Beats Brewery Ltd.* [1951] 2 T.L.R. 875; *Reigate* v. *Union Manufacturing Co. (Ramsbottom) Ltd.* [1918] 1 K.B. 592; *Fowler* v. *Commercial Timber Co. Ltd.* [1930] 2 K.B. 1.

[55] The crucial cases were *George Trollope & Sons* v. *Martyn Bros.* [1934] 2 K.B. 436 and *George Trollope & Sons* v. *Caplan* [1936] 2 K.B. 382. But it seems to have been the rule before that: see *Inchbald* v. *Western Neilgherry Coffee Co.* (1864) 17 C.B.(N.S.) 733 and the many cases cited in the judgments in the *Trollope* cases. See the rigid rule of *Trollope* accepted unquestioningly in later cases: *Bampton* v. *Garner* [1937] 3 All E.R. 458; *Hampton* v. *George* [1939] 3 All E.R. 627; *Way & Waller Ltd.* v. *Verrall* [1939] 3 All E.R. 588; *Musson* v. *Moxley* [1936] 1 All E.R. 64; *Kahn* v. *Aircraft Industries Corpn. Ltd.* [1937] 3 All E.R. 476.

[56] [1941] A.C. 108.

[57] See Lord Wright at p. 145, *infra*, note 59.

general proposition that prevention is always a breach of contract.[58] There are exceptional cases where it is not; sometimes the court will decide that policy is better served by allowing a man freedom of movement commercially rather than by tying him down to one person. Lord Wright has described the interest protected as " the freedom of a principal to deal with his own property or business according to his own judgment." [59] To date it has been mainly in commission cases where this policy has made itself felt. But it has been emphasised that a close watch must be kept on every case where prevention is pleaded.[60] The " implied term " has played an important part.

Duty not to Obstruct: Mere Hindrance

Here, B does not prevent A from performing his part, nor does he put A in breach of any of the contractual provisions. All he does is to make it more difficult for A to perform, so that it causes him extra time, extra expense and extra trouble. The contract has turned out to be a nuisance to him, perhaps an expensive nuisance.

Prima facie, it would seem that A ought to be able to claim damages from B for this. It is well established that a party to a contract is liable if he delays in performing his own part [61]; there seems to be no reason why he should not be similarly liable if he causes just as much inconvenience to the other party by delaying *his* performance.[62] The courts have indeed recognised this as a general principle. Vaughan Williams L.J. has said:

> " There is an implied contract by each party that he will not do anything to prevent the other party from performing the contract or to delay him in performing it. I agree that generally such a term is by law imported into every contract." [63]

An application of this principle is to be found in *City of Dublin Steam Packet Co.* v. *R.*[64] It was held that a company which was, by contract with the Crown, to be allowed the use of a certain pier for the purpose of carrying mail had a right of action when their performance was hindered by the fact that many other vessels were being allowed to use the pier.

[58] For another case where prevention was held to be no breach see *Cory* v. *London Corporation* [1951] 2 K.B. 476.

[59] *Luxor Ltd.* v. *Cooper* [1941] A.C. 108, 145.

[60] See Devlin J. in *Mona Oil Equipment Co. Ltd.* v. *Rhodesia Railways Ltd.* [1949] 2 All E.R. 1014, 1017.

[61] If the contract states no time for completion, the law will imply that the act must be done within a *reasonable* time.

[62] Sometimes the delay in A's performance will have been caused by B's delaying performance of his own express promises. There will then be no problem: he will be liable on that account. See *Lawson* v. *Wallasey Local Board* (1882) 11 Q.B.D. 229 and *Mertens* v. *Home Freeholds Co.* [1921] 2 K.B. 526.

[63] *Barque Quilpué Ltd.* v. *Brown* [1904] 2 K.B. 264, 271. See also *Harrowing* v. *Dupré* (1902) 7 Com.Cas. 157, 162, *per* Bigham J., and the Australian case *Marshall* v. *Colonial Bank of Australasia* (1904) 1 C.L.R. 688.

[64] (1908) 24 T.L.R. 798. See especially *per* Farwell L.J. at p. 801. Note also *Nitrate Producers S.S. Co.* v. *George Wills & Co.* (1902) 19 T.L.R. 626.

But, like the principle of "non-derogation from grant," this principle is not a strong one, and there have been warnings that before it is applied each case must be carefully examined on its own facts to see whether there is an implied term forbidding the act in question.[65] The decisions show a reluctance to imply the term, especially where the party was just pursuing his own business interests and carrying on profit-making activities which happened to clash with the plaintiff's interests. So, it has been held that a charterer was not liable to a shipowner just because the former had a number of other ships loading at the named port so that the shipowner had to wait[66]; that it is no breach for the consignor of a large consignment of goods by different vessels to make slightly more favourable contracts with some shipowners than others, giving the former priority.[67]

Duty to Co-operate Actively

We now examine whether a party to a contract owes a duty actively to help the other to perform his part. In the light of the findings we have already made, it must be said that it will be surprising if a man is thus bound. The law would seem to be more hardhearted than that.

In examining the cases, one runs against the same problem as in the cases on prevention: that sometimes failure to co-operate is pleaded as a breach of duty, and sometimes as a factor which estops the guilty party from relying on a condition. But in this field, cases of the latter kind have placed limits on how far co-operation is required which seem to be in line with those established by the "duty" cases, so it is easier here to treat the question as a single one: how far is co-operation required by the law of contract?

(i) *Co-operation as a necessity*

It is convenient to begin with the statement of law by Lord Blackburn in *Mackay* v. *Dick*.[68] He said:

> "Where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect."

This is an austere proposition. It goes no further than to impose a duty to act if an express term of the contract *cannot* be fulfilled without that act being done. So, the property in goods cannot be transferred by delivery if the transferee refuses to take them; a

[65] See Vaughan Williams L.J. and Bigham J. in the cases cited in note 63.
[66] See the *Brown* and *Harrowing* cases (*supra*, note 63) and *Ogmore S.S. Co.* v. *Borner & Co.* (1901) 6 Com.Cas. 104.
[67] *U.S. Shipping Board* v. *Durrell* [1923] 2 K.B. 780.
[68] (1881) 6 App.Cas. 251, 263.

co-operative act of acceptance is required from him."[69] A man who engages an artist to paint his portrait implies that he will give sittings."[70] If a seller of goods is under a duty to get an export licence the buyer must give him the requisite information about the destination of the goods."[71]

(ii) The limits of co-operation

None of these examples goes very far: in all of them it is clear that the contract would come to a complete halt if the act in question were not done. How much further does the duty to co-operate go than absolute necessity? Evidently it cannot go much further, for Lord Blackburn would otherwise not have used the strict language he did.

The first comment that needs to be made is that this "necessity" requirement does not always make good sense. It does where the contract places a duty on A to do a certain act which A *cannot* do without B's doing a certain act as well. But the "necessity" test becomes blurred when the contract does not specify who is to do the act: if, instead of saying "A will load the ship at X," it just says "the ship will be loaded at X." Here it is not so meaningful to say that "each party must do what is necessary to be done by him," for while it may be clear that certain acts are necessary to load the ship, some of these can be done equally well by either party. All the court can then do is to apportion out the required acts between the parties according to who is the better positioned to do them. This has often been done. It was in *Mackay* v. *Dick* itself, where the court had to allot the various tasks involved in conducting a test of a machine to one or other of the parties.[72] So to this extent "necessity" is perhaps not a completely helpful criterion.

But even if the act in question is laid down by the contract as

[69] See *Colley* v. *Overseas Exporters* [1921] 3 K.B. 302.

[70] Viscount Simon in *Luxor (Eastbourne) Ltd.* v. *Cooper* [1941] A.C. 108, 118. So also the man who engages a dentist to make dentures impliedly promises that he will co-operate by allowing the dentist to examine his mouth, etc.: *Samuels* v. *Davis* [1943] K.B. 526, 527.

[71] Viscount Simonds in *Pound* v. *Hardy* [1956] A.C. 588, 603. For other examples see *Hall* v. *Conder* (1857) 2 C.B.(N.S.) 22 and *Terry* v. *Moss's Empires Ltd.* (1915) 32 T.L.R. 92 (If a contract is to be carried out "at a time to be agreed" both parties must make a reasonable effort to find a mutually satisfactory time.) Also, on more individual facts, see *The Valseria* [1927] P. 115; *Kleinert* v. *Abosso Gold Mining Co. Ltd.* (1931) 58 S.J. 45; *Tiberghien Draperie Societa* v. *Greenberg* [1958] 1 Lloyd's Rep. 789. See also Lord Uthwatt in *Winter Garden Theatre Ltd.* v. *Millennium Productions Ltd.* [1948] A.C. 173, 201.

[72] See especially Lord Blackburn, 6 App.Cas. at p. 264. Note also, on the same question of "testing" *Brogden* v. *Marriott* (1836) 2 Bing.N.C. 473; *Miller* v. *Way* (1835) 40 Com.Cas. 204. See the classic statement of the respective duties on loading a ship given by Lord Esher in *Harris* v. *Best* (1892) 68 L.T. 76, 77 (although his apportionment of the respective "parts" of each has recently met with doubt from Devlin J. in *Pyrene* v. *Scindia Navigation Co.* [1954] 2 Q.B. 402, 419). See also Lord Esher's description of unloading in *Peterson* v. *Freebody* [1895] 2 Q.B. 294.

the sole duty of A the court will sometimes require B to do more than just what *necessity* demands to help him. Viscount Simonds has said, for instance, that if the duty to obtain a sales licence is with the seller, " the buyer must co-operate by telling him the destination of the contract goods *and otherwise as may be reasonable.*" [73]

Again, in more than one case it has been held that one party must give notice to the other of certain facts which he is in a better position to know: a tenant, for instance, cannot sue a landlord for failure to repair unless he has given notice that repair is required.[74]

But the law is not prepared to go much further. While it goes a little beyond absolute " necessity "—as to be sensible it must—it stops short of demanding co-operation merely because that would be reasonable. The English law does not require a degree of conduct equivalent to the Roman " good faith." By and large, the motto seems to be " each man for himself," and a party is not required to interrupt his own activities merely to help the other if he sees him getting into difficulties.[75]

The best illustration of this tendency is to be found in *Mona Oil Equipment Co.* v. *Rhodesia Railways Ltd.*[76] A contract of sale provided that the sellers could obtain payment by means of signed confirmation by nominees of the buyers. When the sellers approached the nominees for the purpose, the nominees professed not to act immediately but to wait until they had received specific authorisation from the buyers. The sellers mistakenly thought that the nominees were refusing to act at all, and complained to the buyers. The buyers did nothing to remove the misunderstanding; but, without telling the sellers, they sent instructions to their nominees. The sellers remained under the misunderstanding and assumed that the contract was " off." When they discovered the true facts they sued the buyers, alleging breach of an implied term which Devlin J. said was based on the suggested " necessity for co-operation." But he found the buyers not liable. He said:

> " I can think of no term that can properly be implied other than one based on the *necessity* for co-operation. It is, no doubt, true that every business contract depends for its smooth working on co-operation, but in the ordinary business contract, and apart, of course, from express terms, the law can enforce co-operation only in a limited degree—to the extent that is *necessary to make the contract workable.* For any higher

[73] *A. V. Pound & Co. Ltd.* v. *M. W. Hardy & Co. Inc.* [1956] A.C. 588, 608.

[74] *Makin* v. *Watkinson* (1870) L.R. 6 Ex. 25. This principle is one of some generality: *Kawasaki Kisen Kabushiki Kaisha* v. *Bantam S.S. Co. Ltd.* [1938] 2 K.B. 790.

[75] Indeed there are some cases, not apparently very different from those in note 74, where notice has been held unnecessary: see *Sieveking* v. *Maass* (1856) 6 E. & B. 670.

[76] [1949] 2 All E.R. 1014.

> degree of co-operation the parties must rely on the desire that both of them usually have that the business should get done." [77]

The case is a harsh one; it would have been no trouble for the defendants to correct the mistake. But the law evidently felt that it was up to the mistaken party to get to the bottom of the matter himself.[78]

So when Lord Blackburn spoke of "necessity" in *Mackay* v. *Dick* he perhaps did not mean that in the strictest sense, but he did mean to emphasise that there are definite limits on what a man is expected to do to help his contractual partners.

C. Conclusion: the Function of the Implied Term

1. It appears that the English law of contract does not require an attention by one party to the other which amounts to absolute "good faith." Something a good deal less than that will suffice. A party must perform his express promises to the letter [79]; he must refrain from certain acts which substantially impede either the other party's performance or his enjoyment, in particular if those acts are done without any reasonable excuse. But this does not go very far. He may be allowed to get away even with positive acts of obstruction if he was merely going about his business with others. He is seldom required actually to do a positive act which is not provided for in express terms; he need only do that if there is something approaching a necessity for the act to render the express parts of the contract workable.

It seems that the law has espoused a policy of free enterprise and "look out for yourself." The courts have not been willing to restrict A's business activity—whether in dealings with goods or land—just so that he can please B, one of his contractual partners. This is a policy which is exemplified elsewhere in the law: for example in the cases on covenants in restraint of trade [80] and covenants against assignment.[81]

2. So one finds an almost complete lack of legal rules laying down broad moral principles of the "do as thou would be done by" kind. Whenever the courts have stated prima facie rules,

[77] At p. 1018. Italics supplied.

[78] One finds a very similar sentiment in *Peter Dumenil & Co. Ltd.* v. *James Rudding Ltd.* [1963] 1 W.L.R. 815. See also *Stoanes* v. *The Commonwealth* (1919) 20 S.R.N.S.W. 27 (Australian) and *Harrison* v. *Walker* [1919] 2 K.B. 453.

[79] The law is very strict about this. If a man has promised something, it is no excuse for failure to perform that his own business interests had been occupying his attentions. In other words in this case he must put himself last: see especially *Maritime National Fish Ltd.* v. *Ocean Trawlers Ltd.* [1935] A.C. 524.

[80] See the law set out in *Cheshire and Fifoot on Contract*, 6th ed., pp. 824 *et seq.*

[81] See *Re Lander & Bagley* [1892] 3 Ch. 41 (covenant against assignment not a "usual covenant"); *Grove* v. *Portal* [1902] 1 Ch. 727 and *Greenhalgh* v. *Mallard* [1943] 2 All E.R. 234 (covenant against assignment will be strictly construed).

such as that a party must not impede the performance of or enjoyment by the other, they have been astute to emphasise that each case must be carefully looked at on its own facts. In other words, they have preferred to leave the question as open as possible so that in each case the competing interests of the parties can be fairly weighed. The implied term has played an important part in achieving this. In almost every case where the judges have emphasised that each case is to be examined on its own facts, they have said that the question is one of whether a term can be implied, which depends on the " intentions of the parties " in that case.

So, in the cases on interference with enjoyment, one finds passages which rely heavily on this element of intention: statements that if the parties had been asked they would not " have immediately said ' Oh there is no need really to put that in because it is so abundantly clear ' " [82]; that any other conclusion " would not be to give effect to the intentions of the parties." [83] The same has been true in the prevention cases: " construction " and " implied term " have always been well in evidence in the cases on the subsidiary benefits, and have been brought into prominence in the land agent cases by *Luxor* v. *Cooper*. Again, as we have seen,[84] " implied term " and " intention of the parties " have played an important part in the hindrance of performance and the co-operation cases.

So what, in theory, the courts have been saying is that it is the parties alone who can impose a duty in these cases, and one must scrutinise each case closely for indications of such intention. Yet " intention " is always a very difficult thing to discover in the absence of express words. It is difficult enough if one is trying to find one man's intention; when, as here, one has to try to find a *common* intention, and that on a matter which the parties probably never even thought about, there can be no other conclusion than that it is the court which is imposing its own views of what they ought to have intended. In the last resort, it is the court itself which imposes the standard.

But this phraseology of " implied term " and " intention " is useful and flexible; it really is the most effective way of ensuring that each case is fully examined on its facts. It does make superficial sense to say that if a matter really depends on what these parties intended, it cannot be relevant to look at rules laid down in earlier cases involving different parties. The implied term approach allows the court to come to a case as nearly untrammelled by precedent as the law can ever be, and to take into account all the relevant factors.

[82] *Lievook* v. *Pearson* (1928) 33 Com.Cas. 188, 194, *per* Branson J.

[83] *Dare* v. *Bognor U.D.C.* (1912) 76 J.P. 425, 427, *per* Buckley L.J. See also *Re Cadogan & Hans-Place Estate Ltd.* (1895) 11 T.L.R. 477, *per* Lindley L.J. and *Kelly* v. *Battershell* [1949] 2 All E.R. 830, 838, *per* Cohen L.J.

[84] See above, pp. 401–405.

8. The current tests for the implication of terms play a large part. Although one finds many different statements of them, it may be said that there are two basic tests: (1) that a term cannot be implied unless the parties must necessarily have intended it so that both would have answered "Oh of course" to an officious bystander had he suggested it in negotiations [85] and (2) that the term must be "necessary for business efficacy." [86] These tests may be different statements of the same thing, they may be cumulative, or they may be different tests, either of which can be used; it is not certain. But neither of them is automatic of application; they both require a creative effort by the judge. In the one, he must guess at hypothetical intention, and in the other he has to place a meaning on "business efficacy," a very vague standard indeed!

But the tests are both of some significance in this field of "co-operation." In the first place, both of them are restrictive: they ensure that terms will be rejected more often than they are implied, and that mere "reasonableness" is not enough to justify implication. These tests ensure, then, that mere friendly assistance will almost never be required as an implied duty, for such conduct is nothing more than "reasonable." The tests really are just another expression of the rather hard view of our law that there is no sentiment in business.

But the tests are of more significance than that. To take them separately, the "bystander," or "necessary intendment" test at least emphasises that before a term is implied the interests of both parties must be looked at. The requirement that *both* parties must answer "yes" to the bystander at least ensures that the main activity behind implying terms—a balancing of interests—is kept in mind.

The "necessary for business efficacy" test is more difficult. But it is not entirely meaningless. The word "necessary" serves as a reminder that terms are not to be readily implied. But "business efficacy" does express, in rather vague language, the consideration that in commerce a contract must be such as that businessmen can rely on performance and some degree of benefit in due course. So in the sphere of co-operation the phrase "*necessary* for *business efficacy*" does bring out a difficult antinomy: that the business world demands the smooth working of contracts, but that one party should not lightly be found to be under any unexpressed duty to help the other.

J. F. BURROWS.*

[85] See Lord Esher in *Hamlyn & Co.* v. *Wood & Co.* [1891] 2 Q.B. 488, 491; Scrutton L.J. in *Reigate* v. *Union Manufacturing Co. (Ramsbottom) Ltd.* [1918] 1 K.B. 592, 605; MacKinnon L.J. in *Shirlaw* v. *Southern Foundries Ltd.* [1939] 2 K.B. 206, 227.

[86] The creation of Bowen L.J. See, in particular, *The Moorcock* (1889) 14 P.D. 64, 68.

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WAGE-SLAVE OR ENTREPRENEUR?

LIKE a yogi contemplating his navel, although without the same apparent satisfaction, the labour lawyer is necessarily drawn to the contemplation of the mystery comprised in the word " servant," or " employee "—the judicially commended word for contemporary use.[1] Industrial law, itself a misnomer for what American and continental lawyers term more correctly labour law, has been defined as " a non-technical term almost equivalent to what lawyers call the Law of Master and Servant." [2] As such, industrial law in its common law and (increasingly) statutory application is confronted to an unusual degree with the problem of the so-called " categories of competing reference " [3] such as employee, agent, independent contractor and officer of a company. It is difficult to dissent from Professor Stone's assertion that the syllogistic process by which the courts arrive at conclusions is largely illusory in that the conclusion is already implicit in the initial choice of the appropriate category.

An interesting triptych of cases in 1966 and a recent 1968 case, dealing with the familiar servant *v.* independent contractor conundrum, show that the courts, working against the background of an increasingly technocratic society, are being required to counterbalance the advantage of clear and simple definition against newer and possibly more uncertain definition where the latter permits of legal adaptation to changing patterns of social and economic organisation. It is proposed to consider the four cases to see if they cast any light upon the quintessence of " service " in contrast to " services." The cases also provide a legitimate pretext for concluding with some general observations concerning the adequacy of legal definition in this important and growing area of law.

[1] Presumbly because it is free of the domestic or menial overtones attaching to " servant ": see Fridman, *The Modern Law of Employment*, pp. 81–82. This is in line with the increased social susceptibility of a society preoccupied with status and which prefers the rodent operator to the rat-catcher (see the apocryphal reincarnation of the chimney-sweep as the " domestic decarboniser " in Saunders and Wilson, *The Professions*, Clarendon Press, 1933).

[2] Frank Tillyard, *Industrial Law*, p. 1: " almost equivalent " because industrial law must occasionally take cognisance of the " home-worker " or the " out-worker." Statutory definitions sometimes reflect this, *e.g.*, s. 10, Truck Amendment Act 1887; s. 10, Employers and Workmen Act 1875; s. 8, Industrial Courts Act 1919; and s. 24, Wages Councils Act 1959 (but see *Westall Richardson Ltd.* v. *Roulson* [1954] 1 W.L.R. 905).

[3] Prof. J. Stone, *Legal System and Lawyers' Reasoning*, 1964. The author seeks to show that " each such illusory category identified, since it does not yield any one necessary answer by the syllogism both invites and compels the court to an answer based on evaluation, conscious or unconscious, of the social situation confronting it " (p. 241). Judicial acknowledgement of this factor is revealed in Lord Radcliffe's opening remarks in *I.C.I. Ltd.* v. *Shatwell* [1965] A.C. 656.

THE FOUR CASES

In the first case, *Emerald Construction Co.* v. *Lowthian*,[4] the Court of Appeal granted an interlocutory injunction restraining the defendants, trade union officials, from bringing pressure to bear upon a building firm which had employed the plaintiff to execute bricklaying work under a " labour only " sub-contract. Under the terms of the sub-contract the plaintiff agreed to provide all labour for brickwork at agreed prices, whilst the main contractor assumed responsibility for materials, plant and transport, reserving to himself the right to allocate brickwork to other sub-contractors. It appeared that he might terminate the contract should the plaintiff fail to maintain reasonable progress. Bearing in mind that the proceedings were interlocutory, the Court of Appeal felt that a prima facie case had been made out showing that the variety of pressures which had been applied to secure the dismissal of the sub-contractor amounted to an attempt to procure a breach of contract. Much of the discussion and criticism [5] of this case hinges on the degree of knowledge required of the *Lumley* v. *Gye* tortfeasor, but, for our purposes, the case is interesting because of the finding that the " labour only " sub-contract was not a " contract of employment " within the meaning (and therefore of the protection) of sections 8 and 1 of the Trade Disputes Act 1906 and 1965 respectively. In line with *Stratford* v. *Lindley* [6] this case reveals how carefully the trade union official must pick his way between inducing or procuring breach of a contract of employment which, if no unlawful means such as intimidation are used, is protected, and inducing or procuring breach of a " commercial " contract, which is not protected. Despite the definition of " trade dispute " in section 5 (3), which is wide enough to include sympathetic action, both the primary boycott involving as a " necessary " consequence the breach of commercial contracts, and the secondary boycott having the same effect, are risky affairs. Trade unions (and some economists) have condemned " labour only " sub-contracting, at present chiefly confined to the building and civil engineering industries, on the grounds that it is bad for the men and bad for the unions; bad for the former, because they lose an impressive amount of common law and statutory protection, and bad for the latter, because the practice weakens their influence as bargaining agencies. In the *Emerald* case, National Working Rule No. 8 (dealing with " labour only " sub-contracting and promulgated by the National Joint Council for the

[4] [1966] 1 W.L.R. 691; [1966] 1 All E.R. 1018.

[5] *e.g.*, that of Prof. K. W. Wedderburn, who suggested to the Donovan Commission that the case might represent an extension of the tort in question (Minutes of Evidence, 31, paras. 5005–5006). And now see *Daily Mirror Newspapers Ltd.* v. *Gardner* [1968] 2 All E.R. 163, discussed below, p. 440.

[6] [1965] A.C. 269. Several of the memoranda submitted to the Donovan Commission advert to the possibility that the employer might *inform* strikers, prospective or actual, of his commercial commitments with the aim of leaving the strikers unprotected by the Trade Disputes Act 1906, s. 3.

Building Industry from July 6, 1964) was being observed, thus constraining the union to put its objection on the ground of "principle." Clearly that principle necessarily implies hostility to the idea of abandoning the common rule in favour of what the Webbs termed individual higgling.[7]

In the second case, *Re C. W. & A. L. Hughes*,[8] Plowman J. faced another problem of classification. Directors who had guaranteed an overdraft on the company's wages account claimed that they were subrogated to the rights of the bank under section 319 (4) of the Companies Act 1948, which confers a limited priority upon persons who advance money for the purpose of paying wages, salary or accrued holiday remuneration to "any clerk, servant, workman or labourer in the employment of a company." Did "employment" include a group of men who had sub-contracted for labour only, no distinction being drawn between the gangleader and the men in this respect? Plowman J. held that the directors' claim to subrogated, preferential creditor status failed because the men, upon whom the amounts in question had been disbursed, were not in employment.[9] In arriving at this conclusion Plowman J. considered the totality of circumstances such as lack of overtime, lack of provision for time lost by reason of bad weather, absence of P.A.Y.E. arrangements, absence of any agreement relating to holidays or expenses, the circumstance of recruitment and dismissal by the gangmaster, and, not least, the limited degree of control by the company typified by the men's freedom to leave the site when it rained. In deciding that these men were not "ordinary employees," the "control test" (*pace Salmond on Torts*) is given prominence in the judgment, although other "marks of service" are admitted, *e.g.*, power of selection, payment of wages, right of suspension or dismissal and the nature of the duties. *Emerald* was followed in order that "artificial and unnecessary refinements in the law" might be avoided, despite the rather perfunctory treatment of the matter in the earlier case. Undue attachment to fixed legal conceptions has been characterised by Pound as one of the symptoms of jurisprudential decay.[10] "The premises," he said, "are no longer to be examined. Everything is reduced to simple deduction from them. Principles cease to have importance. The law becomes a holy body of rules." The adoption of a fixed conception of employment may result in the avoidance of artificial distinctions but it can produce diverging social results. Thus, the *Hughes* decision would presumably gratify those bent on making harder the bed of the self-employed worker. That such a worker merely ranks

[7] See for a full account of "labour only" sub-contracting, including its history, G. de N. Clark (1967) 30 M.L.R. 6–24.
[8] [1966] 1 W.L.R. 1369; [1966] 2 All E.R. 702.
[9] The difficulty of defining "employment" is discussed in Potter and Stansfield, *National Insurance, Industrial Injuries*, p. 59. In *Re Rampgill* [1967] Ch. 1138, Plowman J. granted a claim for subrogated status under s. 319 (4).
[10] (1909) 18 Yale L.J. 454.

as an ordinary creditor for arrears of remuneration in the event of bankruptcy or liquidation appears just to the trade unionist and perhaps to the economist if he considers that enterprise and risk go together. *Per contra*, the *Emerald* decision by applying the common definition of employment is applauded by the individualist to whom, if he does not favour it, the humbling of the group entity means little. To the common lawyer proof of socially divergent results may be proof of the law's impartiality.

The third case, *Whittaker* v. *Minister of Pensions and National Insurance*,[11] takes us from company liquidations and trade disputes into national insurance. The claimant sought industrial injury benefit in respect of a fall which she suffered during her trapeze act in a circus. Mocatta J. had to consider the " hybrid character of the claimant's duties " as regulated by a detailed contract, by virtue of which rather less than half of her working day was devoted to her skilled performance including the preparations therefor, the remainder of her day being occupied with the pedestrian duties of an usherette, or in loading and unloading chairs when the circus moved. In the earlier case of *Gould* v. *Minister of National Insurance*,[12] a music-hall artiste, under contract to appear with a female partner in a comedy duo at a particular theatre for one week, had been held not to be in insurable employment, but this was distinguished on the grounds that (a) the claimant in that case had none of the mundane duties of our trapeze artiste, and (b) the control test, in his Lordship's words, is " not as determinative as used to be thought to be the case " although still of value. His Lordship could not forbear from expressing some surprise at the decision in *Re Winter German Opera Ltd.*,[13] where " an opera singer, clearly not a member of the chorus," was held entitled to preferential treatment as a servant in a company liquidation, preferring instead the Court of Appeal decision in *Simmons* v. *Heath Laundry Co.*,[14] in which a skirt machine-hand was held not to be engaged under a contract of service *quoad* music lessons and piano accompaniments provided in her spare time. It is respectfully suggested that his Lordship was right to ignore the *tertium quid*, namely, that she might partake of both roles—an independent contractor as she sailed through the air, an employee as she showed patrons to their seats. Farwell J. had taken this line in *Hillyer* v. *Governors of St. Bartholomew's Hospital* [15] in finding that nurses were " servants for general purposes " until such time as " the door of the operating theatre has closed on them for the purposes of an operation," whereupon the mystique of professionalism

[11] [1966] 3 W.L.R. 1090; [1966] 3 All E.R. 531.
[12] [1951] 1 K.B. 731.
[13] (1907) 23 T.L.R. 662.
[14] [1910] 1 K.B. 543.
[15] [1909] 2 K.B. 820, 826.

apparently came into play.[16] It is noteworthy that his Lordship took into account the "organisation test" adumbrated by Denning L.J. (as he then was) in *Stevenson, Jordan and Harrison Ltd.* v. *MacDonald and Evans*.[17] The trapeze artiste's lack of real independence and her integration into the organisation led to the conclusion that she was employed under a contract of service and therefore entitled to benefit. Leaving on one side *Emerald*, we have *Hughes*, in which control, if not an exclusive determinant, is given prominence, and *Whittaker*, in which the idea of the organisation plays a part.

The fourth case, *Ready Mixed Concrete (South East) Ltd.* v. *Minister of Pensions and National Insurance*,[18] takes us a stage further to an entreprenurial test which has hitherto received little attention in this country although, as one might expect, it has figured prominently in some American decisions. MacKenna J., reversing a decision of the Minister of Pensions and National Insurance, held that an owner-driver, under contract to deliver concrete in his [19] concrete-mixing truck, was not an employed Class I contributor under the National Insurance Act 1965. As in the *Whittaker* case, the construction of the contract, which spelled out in full the rights and duties of the parties, was a question of law. Taken individually, there were terms to support either conclusion if control were to be the paramount test. Thus, a considerable degree of control was evident from the terms concerning a host of matters, *e.g.*, the owner-driver's availability, the hire-purchase from an associated company, the painting of the truck in the company's colours, the prohibition on operating as a haulier of goods save as provided for by the contract, the wearing of the company's uniform (the badge of servitude?) and subjection to orders "as if he were an employee of the company," conduct, appearance and style of driving, the prohibition of a charge or lien on the truck and the provision for termination of the contract, *e.g.*, in the event of conduct tending to bring the company into disrepute. An equally (if not more) considerable list of terms pointed towards a contract for services, *e.g.*, declaration that he was an independent contractor,

[16] The professional has raised difficulty, as is shown by the "hospital cases." In Roman law the distinction between labour services and the liberal arts was important in that there could be no *locatio* of the latter. A lengthy definition of the "professional employee" is given in s. 2 (11) of the National Labor Relations Act in the U.S. which, in general, excludes him from that Act. The intellectual nature of his work, the requirement of discretion, non-standardised output and higher training are given as criteria. Professional employees may, however, indicate that they desire separate recognition under N.L.R.A. In this country, the ability of trade unions to recruit the increasing numbers of "white-collar workers" will be critical for their survival in future years in view of the relative (though not absolute) decline in "cloth cap" unionism.

[17] [1952] 1 T.L.R. 101, 110–111.

[18] [1968] 2 W.L.R. 775. This case is further discussed by Mr. G. de N. Clark at p. 450 below.

[19] The mixing unit belonged to the company.

omission to give statutory particulars of employment under the Contracts of Employment Act 1963, taxation under Schedule D, payment of Class I national insurance contributions, absence of set hours or meal-breaks, obligation to procure a carrier's " A " licence, payment on a volume/mileage basis and, not least, ownership of the truck.

His Lordship named the three conditions which must be fulfilled before a contract of service may be said to exist, namely, (a) a contract for wages or other remuneration providing for personal work and skill; (b) a sufficient degree of control; and (c) (a negative requirement) that the other provisions in the contract are not inconsistent with a contract of service. Recognising that the problem was one of classification, stress was laid upon (c); a contract to build or to carry goods might involve (a) and (b), but if (c) were lacking it would not be a contract of service. After a review of Australian and American cases, it was concluded that the owner-driver was a small-business man who owned assets and ran risks. Before examining the impact of this particular decision (which is likely to be an important one in borderline situations), something may be said of the " tests " and of the way in which the cases already discussed affect them.

THE CONTROL TEST

There is little support now for the traditional definition of a servant as " a person subject to the command of his master as to the manner in which he shall do his work," [20] *i.e.*, as one who is instructed as to the what and the how. The inadequacy of the test in the marginal case stems not from its intrinsic unsuitability but because it no longer necessarily reflects contemporary social or economic reality. Against the historical kaleidoscope of medieval serfdom, guild system, statutory regulation [21] and industrial proletariat (providing a " reserve army of labour "), control was legally significant because it was, either as an incident of status or of contract, a social reality. To the Victorians, commanding the productive forces liberated by the new machinery and the new forms of association, control was the secular corollary of the Pauline precept to servants that they should be submissive to their masters [22]—a mistaken identification of capitalism and the Christian

[20] *Yewens* v. *Noakes* (1880) 6 Q.B.D. 530, 532–533. In *Walker* v. *Crystal Palace* [1910] 1 K.B. 87, 92, Cozens-Hardy M.R., adjudging a footballer to be a workman, adverted to the requirement that he must obey the captain during the game; *cf.* Buckley L.J. in *Simmons* v. *Heath Laundry Co.* [1910] 1 K.B. 543, 552.

[21] Statute of Labourers, Poor Law and Re-settlement Laws.

[22] St. Paul's Epistle to Titus, ii, 9; St. Paul's Epistle to the Colossians, iii, 22; St. Paul's Epistle to the Ephesians, vi, 5. What G. B. Shaw referred to as the " gospel of work " was not peculiar to the Victorians. Thus, in the *Case of the Tailors of Ipswich* (1614) 11 Co.Rep. 53 (brought into prominence by *Nagle* v. *Feilden* [1966] 2 W.L.R. 1027), it was said: " the law abhors

ethic which played a part in the proscription of religion as the "opium of the masses" in the Communist Manifesto of 1848. The domestic servant who visited her ailing mother without permission broke that nexus of control which was seen to be the central element in the master-servant relationship.

Still important, control has lost its position as the sole determining factor. The reasons for this are to be found in changes in society and not in legal conceptualism. First, the relationship of master and servant has become increasingly depersonalised not only by reason of the emancipation of industrial law from its family law origins,[23] but because of the growing scale of industrial organisation in which the personality of "the boss" is replaced by the curious personality of "the enterprise" which generates its own demands. The simple master-servant dualism is now often a catena of "line relations" in which the person controlling another is likely to be a fellow-servant.[24] Secondly, the individualistic emphasis upon control is often at variance with the realities of collective solidarity on both sides of industry which, taken in conjunction with a policy of full employment, place restrictions upon unfettered managerial rights, *e.g.*, to "hire and fire." [25] Mr. Alan Fox has criticised the unitary frame of reference within which managers see themselves as the wielders of control and authority.[26] He feels that such

idleness, the mother of all evil, *otium omnium vitiorum mater*, and especially in young men, who ought in their youth (which is their seed-time) to learn lawful sciences and trades which are profitable for the Commonwealth."

[23] Control is undoubtedly a survival of the earlier status of the servant who, for legal purposes, fell to be treated in a "family law" context and who was subject to something roughly akin to the Roman *dominica potestas* wielded by Maine's "despot enthroned by each hearthstone." At the beginning of the 19th century, Austin distinguished those private conditions which were domestic or "oeconomical" and those which were professional. The right of the master to the services of the slave or servant was a right *in rem*, *i.e.*, availing against other persons generally—although *vis-à-vis* the servant the right was *in personam* (*Jurisprudence*, (5th ed., 1885), Vol. II, p. 884—although Austin's inquiry transcended national systems, his thinking reflected contemporary attitudes). The tort of interference with the contract of employment was, in origin, an interference with status rather than contract.

[24] *Bainbridge* v. *Postmaster-General* [1906] 1 K.B. 179: an action against the P.M.G. for the negligence of a subordinate official in the Post Office failed because the nexus of principal and agent or master and servant was lacking (p. 191). In *Lewis* v. *London Chronicle* [1959] 1 W.L.R. 698, the facts disclosed a situation in which the employee was torn between loyalty to her immediate superior and the latter's superior but the judgment turned on the gravity of the employee's disobedience.

[25] See "Dismissal Procedures," Report of a Committee of National Joint Advisory Council of the Ministry of Labour, 1967. In the U.S.A. some collective bargains define the ambit of management rights, in contrast to the narrow scope of bargaining in the U.K. Trade unions here are suspicious of "participative management" on the ground that it will blur the line of inevitable conflict between management and labour. See, for example, E.T.U. Memorandum to Donovan Commission.

[26] Research Paper No. 8, para. 11, Donovan Commission. The unitary system "has one source of authority and one focus of loyalty" and produces "an orgy of avuncular pontification," *e.g.*, "our chaps," "All on the Same Side" and "Team-Spirit in Industry." Other industrial sociologists accept (and

managers, by adopting a struthious posture (attributable to the ostrich) in the face of sociological facts, may end up in a weaker position than that in which they frankly recognise a pluralistic organisation containing diverging interests. Acceptance of conflicting aims, *viz.*, of management to assert its authority and control downwards, of labour to assert its independence and control upwards, allows of an articulation of these competing aims.[27] Evidence of loss of control is not hard to find. Thus, dealing with conditions in the electrical contracting industry, the National Board for Prices and Incomes reported that " it is difficult to exercise close or continuous supervision so that the pace of work depends heavily on the good will and application of the individual worker; if these are not forthcoming output and efficiency automatically suffer." [28] This decline in the power to control, which must not be exaggerated, does not mean that employees have become independent contractors; it shows that the test itself is suspect.[29] Lord Thankerton recognised this in *Short* v. *J. & W. Henderson Ltd.*[30] and warned that the criteria therein enunciated (selection, payment, control, dismissal and suspension) were " clearly open to reconsideration " by the House of Lords should the occasion arise. Faced with this general decline in control, attended by greater emphasis upon results than on methods, and with particular instances where control cannot be exercise for physical or even legal reasons, *e.g.*, the train driver, the master of the ship, the certificated colliery manager, the company director and the doctor, all of whom may be employees, attempts have been made to adapt the control test into a " right to control " test or to emasculate it as some " ultimate right " of control. But this does not take us much further, apart from revealing a shift to the when and the where as opposed to the how.[31] It is not therefore surprising that the control test, including its variants, has been " demoted " as the conclusive test of service.[32] In *Morren* v. *Swinton and Pendlebury Borough Council*,[33] the argument that because a resident engineer, appointed by a local authority, worked under the instructions of a firm of consultant engineers, he was

sometimes welcome) the reality of conflict. The long-term interests of both " sides " ultimately depend upon the prosperity of the firm, but this does not preclude conflict in the " here and now."

[27] *Ibid.* para. 54. See also Minutes of Evidence 19, para. 2743, Donovan Commission: " The position today is, of course, that the men can sack the employer more readily than the employer can sack the men."

[28] Report No. 24, Cmnd. 3172, para. 11. The prevalence of overtime is attributed to weak managerial control which enables the workers to spin out the work (Report No. 23, Cmnd. 3167); and see further *Overtime working in Britain*, Research para. 9, Donovan Commission.

[29] MacKenna J. seemed to recognise this in *Ready Mixed Concrete*.

[30] (1946) 62 T.L.R. 427.

[31] See W. H. D. Winder (1964) 80 L.Q.R. 160–2.

[32] *Amalgamated Engineering Union* v. *Minister of Pensions and National Insurance* [1968] 1 All E.R. 864, 871. It is " not as determinative as used to be thought to be the case ": per Mocatta J. in *Whittaker (supra)*.

[33] [1965] 1 W.L.R. 576; [1965] 2 All E.R. 349.

therefore not an employee for the purposes of section 40 (1) of the Local Government Act 1937 failed. Lord Parker C.J. thought the old contrast between the what and the how to be perhaps " an oversimplification " and preferred to rely on the four *indicia* given in *Short* v. *Henderson* (*supra*). Mr. Atiyah has drawn attention to the omission to distinguish between control as a *necessary* as opposed to a *sufficient* test in the numerous cases in which control has been discussed. Accepting that control, or rather " ultimate " control, is an important and sometimes a determining factor, the learned author is clear " that control can no longer be treated as the decisive test in all circumstances." [34] But MacKenna J. in *Ready Mixed Concrete* whilst stating that control is not always a sufficient condition of a contract of service retains it as a necessary condition of a contract of service.[35] In this latter respect he appears to differ from Mr. Atiyah, who uses the *Morren* case (*supra*) to show that in exceptional circumstances control, even in his limited sense, is not a necessary condition.[36] It is suggested, with respect, that control is not invariably a necessary condition.

THE " ORGANISATION " TEST

Although the personal nexus of employer and employee has generally given way to the impersonal participation of the worker in the enterprise, Denning L.J.'s test, formulated in *Stevenson, Jordan and Harrison Ltd.* v. *MacDonald and Evans*,[37] and concentrating on the degree of integration into the " business," has, with rare exceptions such as the recent *Whittaker* case, received a mixed reception. MacKenna J. referred to the " part and parcel of the organisation " test but only to show that " control is not everything "; apart from this the test " raises more questions than I know how to answer." [38] If one regards the employer's business only, it becomes difficult to segregate the owner-driver and the employee-driver as in the *Ready Mixed* case. But is it not permissible to use the test on the driver? Many who are, on a superficial view, " integrated " into the employer's business, *e.g.*, the window-cleaner employed to clean the windows of a large office block, the small bakery with a total output swallowed by some monopsonistic buyer and the truck driver, may well have an " enterprise " or " business " of their own as sole traders or business men. Quite apart from the equivocality inherent in control as a test, such

[34] *Vicarious Liability in the Law of Torts*, p. 48. MacKenna J. draws upon this valuable work in his judgment.

[35] Following *Zaitjus* v. *Wirth Brothers Pty. Ltd.* (1955) 93 C.L.R. 561, 571, in which it was held that there must always be some room for lawful authority to command, if only in incidental or collateral matters.

[36] *Op. cit.* p. 48.

[37] [1952] 1 T.L.R. 101; *Bank voor Handel en Scheepvaart N.V.* v. *Slatford* [1953] 1 Q.B. 248, 290.

[38] *Ready Mixed Concrete (South East) Ltd.* v. *Minister of Pensions and National Insurance* [1968] 2 W.L.R. at p. 798; and Atiyah, *op. cit.*, at p. 88.

persons may own the instrumentalities, have a chance of profit or risk loss as entrepreneurs. As Lord Wright puts it, the crucial question in some cases may be " Whose business it is, or in other words whether the party is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior." [39] The activities of a small enterprise may be integrated into those of a large enterprise but if the former survives the entrepreneurial test based on ownership of assets, chance of profit and risk of loss it must be a contract for services (*locatio operis faciendi*) and not a contract of service (*locatio operarum*).

If integration were to be used as the main test, there would remain the question of the type of integration to be used. In this country, it has been pointed out that " the fact that the workers form an integral part of the company is ignored by the law " in contrast to the relationship between management and shareholders, although the latter may be less real in practice.[40] In Germany, of the four streams of thinking about the corporation in a social market economy (entrepreneurial, neo-liberal, socialising and co-determinative), the latter, worker participation, has played a major part.[41] Professor Michael P. Fogarty refers to the two views held in Germany concerning the corporation-worker relationship, namely, (a) the contract view, and (b) the incorporation view (*Eingliederung*), in which relationships are governed by participation in a community (*Gemeinschaft*).[42] As we have seen, co-determination has, with certain exceptions, failed to make a major impact in the United Kingdom. If it did it would be another nail in the coffin of the control test.[43]

A Multiple and Variable Test

A servant is defined in the American *Restatement* as " an agent employed by a master to perform some service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master." [44] Nevertheless, many other factors are considered such as the need for supervision of the worker, his education and skill, ownership of instrumentalities, periodic and regular payment, continuity or regularity of working hours, work done exclusively for a single employer, fixed workplace or regular route, community attitude (the sociological view), the belief of the parties and the non-delegability of the work. In the United States, where belief in free enterprise is, according

[39] *Montreal Locomotive Works Ltd.* v. *Montreal and Att.-Gen. for Canada* [1947] 1 D.L.R. 161, 169; cited in *Ready Mixed Concrete*.
[40] L. C. B. Gower, *Modern Company Law*, 2nd ed., p. 10.
[41] Detler F. Vagts (1967) 80 Harv.L.R., No. 1, p. 23 *et seq.*
[42] Br. Journal of Ind.Rels., 1964, 2, p. 79 *et seq.*
[43] Productivity bargaining involves (or should involve) worker responsibility for results.
[44] *Agency*, 2d, I, art. 2.

to Professor Galbraith (in his recent Reith lectures), a "minor branch of theology," it is not entirely surprising to read Justice Rutledge's confession in *National Labor Relations Board* v. *Hearst Publications Inc.*[45] that "Few problems in the law have given greater variety of application and conflict in result than the cases arising in the borderline between what is clearly an employer-employee relationship and what is clearly one of independent entrepreneurial dealing." *Ready Mixed Concrete*, admittedly a case in which, like *Whittaker*, the contract spelled out the precise relationship of the parties, is welcome in that by admitting an entrepreneurial test it marks a stage towards the frank admission of a multiple test ranging over a wide variety of factors and allowing of the totality of circumstances to be taken into account. A reservation must be entered against the community attitude test. Perhaps in *Ready Mixed Concrete* the more percipient neighbours might have judged that the driver was "on for himself" but it is possible that others might not have known or cared. Such a test has affinities with the "common-sense" approach advocated by Somervell L.J. in *Cassidy* v. *Ministry of Health*,[46] and criticised by Professor Kahn-Freund as tending to lead to a maze of casuistry without much principle.[47]

It is stated that the relationship of employer and employee in any given case is a question of fact.[48] In *Simmons* v. *Heath Laundry Co.*,[49] Fletcher Moulton L.J. adverted to two extreme cases (the servant, personified by the usher at a private school and the independent contractor in the form of the person who gives singing lessons) and said that between "those two extreme cases lies an infinite number of intermediate cases where the special circumstances point with greater or less force towards the one conclusion or the other, and in my opinion it is impossible to lay down a rule of law distinguishing the one from the other." This statement, which applies with equal, if not greater, force now than when it was made, cannot mean that the determination of the employer-employee relationship, itself a legal abstraction, is purely a factual question. McCardie J. expressed the view in *Performing Right Society* v. *Mitchell and Booker* [50] that the question is often a mixed question of fact and law, unless the contract is written, in which case it is "primarily one of law." [51] In the *Morren* case it was

[45] (1944) 322 U.S. 111, 121. The same judge described the foaling of the control test out of vicarious liability and stated that the simplicity of the test "has been illusory because it is more largely simplicity of formulation than of application." S. 2 (2), *Taft-Hartley Amendment* overruled *Hearst* and resulted in some contraction of N.L.R.A. coverage.

[46] [1951] 2 K.B. 343, 352-353.

[47] (1951) 14 M.L.R. 504.

[48] Halsbury's *Laws of England*, 3rd ed., pp. 23, 447.

[49] [1910] 1 K.B. 543, 549.

[50] [1924] 1 K.B. 762, 765-766.

[51] In the *Whittaker* and *Ready Mixed Concrete* cases the contracts were written and their effect determined under case stated under s. 65, National Insurance

held that once the primary facts have been determined, the inference from those facts is a pure question of law. This seems to be the better view.

Plowman J.'s desire in *Hughes* to avoid artificial and unnecessary refinements is understandable if one bears in mind the remarkable consistency with which the control test (and its accretions) have been applied in differing contexts, *e.g.*, to establish the relationship itself, in vicarious liability, in the application of criminal provisions applicable to servants and in workmen's compensation. In some of these contexts, *e.g.*, vicarious liability and crime, the relationship need not be contractual.[52] Statutory definitions, such as those of "workman," "worker," "labourer, servant in husbandry, artificer, handicraftsman, miner or (person) otherwise engaged in manual labour" and, enjoying current vogue, "employee," are to be read in their statutory settings. The "employee" is defined in section 25 (1) of the Contracts of Employment Act 1963 as "an individual who has entered into or works under a contract with an employer, whether the contract be for manual labour, clerical work or otherwise, be express or implied, oral or in writing, and whether it be a contract of service or apprenticeship." This definition, substantially reproduced in the Redundancy Payments Act 1965, emphasises the contractual nature of the relationship and refers in loose terms to manual, clerical or other work, but does little, as with other statutory definitions, to bring out the quiddity of service. In supplying the omission, the common law may achieve consistency at too high a price.

It may be that we shall have to bear with a variable definition, at least where statutory application is concerned, in addition to a multiple test.[53] In the United States of America it has been found necessary to adapt the common law definition posited upon control so that it accords with the social and economic purposes of labour Acts. "Such statutes . . . should be construed, not as theorems of Euclid, but with some imagination of the purposes which lie behind them,"[54] said the Supreme Court in a case concerning employers'

Act 1965. But Megaw J. had doubts that the question was one of law in *Amalgamated Engineering Union* v. *Minister of Pensions and National Insurance* [1963] 1 All E.R. 864, 868.

[52] *e.g.*, *R.* v. *Foulkes* (1875) L.R. 2 C.C.R. 150: the draft criminal Bill on theft reflects the feeling that special treatment for employees is now largely unnecessary, *e.g.*, larceny by a servant and embezzlement are not present.

[53] Vaisey J., dealing with taxi-cab drivers, pointed out that a driver might be an agent or a servant or a bailee *vis-à-vis* the owner and also two or more of those classes of association when viewed from different angles, "that is to say, the driver may be for the purposes of the National Insurance Act 1946 a servant of the owner, and for the purposes of the returns of income tax he may be regarded as an independent contractor" (*London General Cab Co. Ltd.* v. *I.R.C.* [1950] 2 All E.R. 566, 570).

[54] *Lehigh Valley Coal Co.* v. *Yensavage*, 35 S.Ct. 282; cited in A. Cox and D.C. Bok, *Labor Law, Cases and Materials*, 5th ed., pp. 165-166.

liability legislation, but which characterises the attitude of that court when confronted with labour legislation. Thus, in *United States* v. *Silk*,[55] there arose the question of the application of social security legislation to " unloaders " and " truckers." The former, who came to the yard when they wished and moved coal from vans to bins with their own tools in return for payment by the ton, were held to be employees within the meaning of the legislation. But the " truckers," who delivered coal to customers, were held to be independent contractors, one of the factors influencing this finding being their ownership of the trucks. It was pointed out that " It is the total situation, including the risk taken, the control exercised, the opportunity for profit from sound management, that marks these driver-owners as independent contractors." [56]

To a limited extent, difficulty may be averted by including in statutes categories of " quasi-employees " or " constructive employees " for particular purposes. The Internal Revenue Code of the U.S.A.[57] applies the term " employee " to include officers of companies, common law employees and quasi-servants such as the agent-driver. The device is used in this country also, *e.g.*, the troublesome taxi-cab operator is brought within the fold of insurable employments by the National Insurance (Industrial Injuries) Act 1965.[58] This technique can be useful in certain cases but cannot deal with all foreseeable problems, unless definitions sections are to dwarf the Acts themselves.

Freedom and Control

Judicial definition cannot operate in a vacuum. In the problem of defining the " wage-slave " and the entrepreneur, the difficulty of weighing individual freedom against social interests comes into play. Professor O. Kahn-Freund has recently drawn attention to the confusion which comes from identifying the imposition of rights and duties upon a person irrespective of volition and the shaping of contractual relations by imperative norms operating through the contract.[59] Undoubtedly, employment is increasingly coming to resemble marriage in the sense that the parties, whilst they have liberty to enter the blessed state, or not, as they choose, lack complete freedom to determine the incidents of that relationship. In the latter respect the " autonomy of the contract " is curtailed, but the freedom to enter into the relationship is still important, as Professor Kahn-Freund points out. Where genuine alternatives

[55] (1946) 331 U.S. 704, 67 S.Ct. 1463. Noted by MacKenna J. in *Ready Mixed Concrete*.

[56] (1946) 331 U.S. 704, 719.

[57] U.S. Code, 1964, Tit. 26, 3121.

[58] Sched. 1, para. 12. See also Offices, Shops and Railway Premises Act 1963, s. 90 (4). Truck Act 1831, s. 25, specifies persons deemed to be employers.

[59] (1967) 30 M.L.R. 635-644. For a criticism of the contractual basis of the employment relationship see R. W. Rideout, *Current Legal Problems 1966*, pp. 11–127.

exist, such as the "sale" [60] of labour in the form of service rather than services, the heteronomic solution of abolishing one of the options for a given class would indeed constitute a reversion to status from contract. It would be a bold judge who would now express the views stated by Collins M.R. in *Simpson* v. *Ebbw Vale Steel, Iron and Coal Co.*,[61] where, explaining the function of workmen's compensation legislation, he said that "it treats the class of workman as being in a sense '*inopes consilii*' and the legislature does for them what they cannot do for themselves; it gives them a sort of state insurance, it being assumed that they are either not sufficiently intelligent or not sufficiently in funds to insure themselves." Judicial paternalism of this sort would not be particularly acceptable in the face of the *embourgoisement* of the working class. The latter phenomenon is typified in the evidence, given to the Donovan Commission, of "young strong men" [62] with entrepreneurial leanings which some employers, for economic reasons, are prepared to gratify. It is, as one witness put it, "a marriage between willing parties." [63]

Do the parties want some of the perquisites of the nuptial state without the consummation? The employer may hope to escape both from his common law duties and the increasing number of statutory burdens which have been cast upon him, *e.g.*, the requirement of particulars of employment, redundancy payments, selective employment tax, industrial training levy and the bother of P.A.Y.E. The employee may hope to bask in the more liberal atmosphere of Schedule D.[64] In *Hughes* we had some ritualism involving the *traditio* of receipts for wages over twopenny stamps which was presumably directed at the appeasement of the gods in the Inland Revenue Department. In *Lafone* v. *Smith*,[65] a theatrical performance in a chamber below the stage which was reflected by mirrors to give the illusion that the action was taking place on stage was held, despite its ingenuity, to contravene an Act under which a penalty was imposed upon those performing plays with a licence. In *Ready Mixed Concrete*, MacKenna J. treated the contractual declaration that the owner-driver was an owner-driver as irrelevant

[60] S. 6 of the Clayton Act provides that "the labor of a human being is not a commodity or article of commerce." *Cf.* the distinction between "personal factors" in personal services and the impersonal nature of "soulless cases of sale of goods" in *Yetton* v. *Eastwoods Froy Ltd.* [1966] 3 All E.R. 353, 365.

[61] [1905] 1 K.B. 458, 458; approved by Buckley L.J. in *Simmons* v. *Heath Laundry Co.* [1910] 1 K.B. 543, 551.

[62] Minutes of Evidence, 16, 2844.

[63] Minutes of Evidence, 16, 2854. A Departmental Committee of the Ministry of Labour under the chairmanship of Prof. Phelps-Brown has been set up to examine the problem.

[64] *e.g.*, in relation to his car: the most his Sched. E counterpart can aspire to is a claim for the expenses "of keeping or maintaining a horse" (Sched. 9, para. 7, to the Income Tax Act 1952).

[65] (1859) 28 L.J.Ex. 33; cited in Maxwell, *Interpretation of Statutes*, 11th ed., p. 111.

in the event of the court deciding as a matter of law that the driver was a servant, although he conceded that in a doubtful case such declaration might have evidential value.[46] It is, with respect, submitted that this is the correct course. The deliberate omission to fulfil statutory obligations in regard to P.A.Y.E. and social insurance cannot, of itself, be conclusive. We have seen that the statutory definitions refer to the contract of service without defining it so that the circularity attendant upon making inferences from the attitude of the parties to statutory definitions need not be laboured. As Lord Macnaghten observed in *Netherseal Co.* v. *Bourne* [47]: " People cannot escape from the obligation of a statute by putting a private interpretation on its language." It is always a difficult matter to balance the rule against evading a statute with the rule that a party may keep himself outside the purview of a statute. The sensitivity of the common law in the latter respect is shown by the statement of Lord Cranworth L.C. that " it is not a question of evasion. A transaction is either within or without the law, and malice is not to be attributed to a person who so carries out a transaction that it remains outside the law." [48] Occasionally, the pendulum may swing too much for some tastes in the direction of the latter rule. This, it is suggested, has happened in some recent " re-financing " decisions in which the courts have appeared perhaps too ready to dismiss the irrelevance of contractual provisions as " commercialese." The distinction between ulterior motive and intention is a fine one and the layman is likely to dismiss the distinction between the motive of borrowing on the security of a car and the intention to effectuate that motive by a sale and re-hiring as typical of the chicanery to which lawyers are addicted. In the *Ready Mixed Concrete* case, the judge was confronted with legal alternatives reflecting genuine economic alternatives. It would be status in the true sense if the choice were to be taken away. If free choice involves social evil, the remedy is legislative action through the contract.

Conclusions

1. The control test (including its variants [49]), whilst likely to remain of importance in the majority of situations, cannot, to use Mr. Atiyah's words, be regarded as a necessary or sufficient test in all cases.

2. There are signs of a move towards a more flexible multiple test in which a wider range of factors is taken into account. Such a test has regard to the total situation.

[46] [1968] 2 W.L.R. 775, 789.
[47] (1899) 14 App.Cas. 228, 247.
[48] *Edwards* v. *Hall* (1855) 25 L.J.Ch. 82, 84.
[49] MacKenna J. considered that power of selection and right of suspension or dismissal are relevant to determine the existence of a contract but of little use in determining whether the contract is one of service: [1968] 2 W.L.R. at p. 798.

8. Such a test must also be adapted to subserve the purposes of a statute where the latter's application is concerned.

4. In dealing with " evasion " of statutory liabilities, a multiple test should be applied to produce results which accord with economic realities. If alternatives exist and are not just optical illusions the law should be slow to interfere with freedom of choice. Social evils attendant upon specific practices should be dealt with by means of compulsory norms operating through the contract rather than through a status solution.

The Haldane Society in its Memorandum to the Donovan Commission [70] lists the evils which flow or may flow from " labour-only " subcontracting in the building industry. This problem may be countered, in their view, by (1) amendment of relevant statutes; (2) declaring the " labour only " contract illegal in defined circumstances; (3) enacting a registration scheme comparable to the dock-workers' scheme; (4) entrusting to a court or tribunal the power to rule that workpeople shall be " deemed for all purposes to be servants of the main contractors " if the main contractor has effective control, or their work is integrated into the main contractor's enterprise or more than, say, four men were employed in the same occupation for a period exceeding, say, one week. The Society do not favour (1), since this would, as we have seen, complicate the law excessively. (2) in their view would be difficult to enforce and would set the law sharply against the economic interest of some participants. (3) is not ruled out, whereas (4) is favoured, since it would permit the court or tribunal to strike at labour-only subcontracting " while not penalising genuinely self-employed traders and specialists." It is, with respect, suggested that the fallibility of the tests given in (4), particularly if entrusted to the Industrial Tribunals, as is suggested, might have precisely just that effect of penalising genuinely self-employed workers.

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[70] Minutes of Evidence, 56, pt. VI.

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STATUTES

Commonwealth Immigrants Act 1968

From a legal standpoint this much-publicised measure [1] has at least three serious implications. It authorises the violation of the duty imposed on the United Kingdom by international law to admit its own citizens; it confers new discretionary powers on immigration officers without subjecting their decisions to the system of appeals proposed by the Wilson Committee [2]; and it obliges persons who may have no intent to evade the immigration laws to prove their innocence in certain circumstances.

Any citizen of the U.K. and Colonies holding or included in a current passport issued by the Government of the U.K.[3] was exempt from the restrictions in the Commonwealth Immigrants Act 1962, and therefore retained an automatic right of entry into the U.K. Section 1 of the Act of 1968 takes away this right, unless the citizen, or at least one of his parents or grandparents, (a) was born in the U.K., or (b) is or was a person naturalised in the U.K., or (c) became a citizen of the U.K. and Colonies by virtue of being adopted in the U.K., or (d) became such a citizen by registration under the British Nationality Acts in the U.K. or in a specified Commonwealth country. As is well known, the purpose of this new restriction is to slow down the entry into the U.K. of East African Asians who, through choice or inadvertence, did not acquire citizenship of the countries in which they reside within the required period after independence and who hold U.K. citizenship and U.K. passports. There are probably not more than 100,000 of these and not all of them would wish to come to the U.K.[4] The Government could have achieved its objective by the administrative act of withdrawing the U.K. passports issued to these persons. Although this might have been a shameful breach of international standards, no right

[1] The political background is described by B. Boston, "How the Immigrants Act was passed," *New Society* (No. 287), March 28, 1968, pp. 448–452.

[2] Report of the Committee on Immigration Appeals. Cmnd. 3387, noted by the present writer in (1968) 31 M.L.R. 310.

[3] British missions overseas are instructed to endorse passports issued to citizens of the U.K. and Colonies who fit into the category of "belongers" of a particular dependent territory as having been issued on behalf of the Government of that territory: H.C.Deb., Vol. 759, Written Answers, col. 284. The effect of this practice and the definition of "U.K. passport" in s. 1 (3) of the Act of 1962 is that most persons from non-independent territories are not entitled to enter the U.K. as of right: *R.* v. *Secretary of State for the Home Department, ex p. Bhurosah* [1968] 1 Q.B. 386 (C.A.).

[4] E. Burney in I.R.R. *Newsletter* (N.S.) (1968) 2, p. 115; *cf.* H.C.Deb., Vol. 759, col. 1528. For the background see: *Portrait of a Minority · Asians in East Africa* (ed. D. P. Ghai) (Nairobi, 1965) and G. Delf, *Asians in East Africa* (London, 1963).

of action would have accrued to the passport losers. Instead legislative action was taken to narrow down the category of those who are deemed to " belong " to the U.K.[5] The curious result is that an unknown number of U.K. citizens living abroad has been affected. The immediate alternatives were legislation which expressly discriminated on racial grounds or the denationalisation of certain U.K. citizens. Both these solutions would have been utterly repugnant to international law [6] and to the policy pursued in the past by the U.K.

A " flexible " quota of 1,500 vouchers per annum (for heads of households) has been fixed for the entry of these citizens.[7] The criteria which the High Commissioners in the territories concerned have been directed to apply in allocating these vouchers are (i) the personal circumstances of the applicant, and (ii) his legal status under the law of that country.[8] What happens when the quota is exhausted? Assume that X, an Asian trader resident in Kenya, who holds a U.K. passport and citizenship, is refused a trading licence [9] and is expelled from Kenya because his permit to remain there has expired.[10] As a matter of international law, the U.K. would be obliged to admit X, at least if no other country will have him.[11] Indeed, the Home Secretary acknowledged this when he said of such a case: " We shall have to take him. We cannot do anything else in the circumstances." [12] The situation will be even more acute if a third country is involved. Assume that X, instead of flying direct to the U.K. flies first to Orly and then by Air France to Heathrow. The supplementary provisions in the First Schedule to the Act of 1962 make it clear that there are only four

[5] The connection through parentage and grandparentage for entry purposes should be compared with the narrower tests of paternal or maternal descent for purposes of acquisition of U.K. citizenship: British Nationality Act 1948, s. 5, and British Nationality Act 1964, ss. 1, 2.

[6] P. Weis, *Nationality and Statelessness in International Law* (London, 1956) pp. 58–59, 85–86, and the same author's article on " The U.N. Convention on the Reduction of Statelessness " (1962) 11 I.C.L.Q. 1073. See too, K. Ryan in *International Law in Australia* (ed. D. P. O'Connell), p. 473, on the Imperial Government's dislike of immigration laws in the Australian colonies which used an express racial test for exclusion.

[7] These vouchers are entirely separate from the 8,500 employment vouchers available annually to other controlled Commonwealth citizens. The new basis on which the latter are being distributed is explained in H.C.Deb., Vol. 759, Written Answers, cols. 242–243.

[8] H.C.Deb., Vol. 759, cols. 1255, 1440.

[9] Kenya Trade Licensing Act 1967, ss. 3, 5.

[10] Kenya Immigration Act 1967, s. 4 (2).

[11] Weis, *op. cit.*, p. 49. This is the opinion stated in all the leading textbooks, and is supported by state practice, *e.g.*, Hackworth, 3 *Digest of International Law*, p. 740. Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (not ratified by the U.K.) goes much further: " No one shall be deprived of the right to enter the territory of the state of which he is a national " (Art. 3 (2)).

[12] H.C.Deb., Vol. 759, cols. 1501, 1586–1587; and cols. 1443–1446. A series of amendments designed to exempt citizens expelled or denied their right to earn a living in their country of residence were rejected: *ibid.*, cols. 1553–1604.

countries to which the Home Secretary may direct the owners or agents of a ship or aircraft to remove a prohibited immigrant: (i) the country of which he is a citizen; (ii) the country of which he has a passport; (iii) a country to which there is reason to believe he will be admitted; and (iv) the country in which he embarked for the U.K. If the Home Secretary were to exercise his powers in X's case the only country which could be specified in the directions would be France. No doubt, back at Orly, X will be met not by a brass band but by a modern rendition of Wagner's *Flying Dutchman*. More realistically, these examples (not to mention cases of deportation) [13] illustrate that this Act of Parliament will become ineffective once its application would constitute a direct breach of international law. If section 1 is to lose the attributes of law at the very moment that its purposes (keeping out large numbers of Asians) are to be served, why was it enacted in the first place? A lawyer is bound to answer that Parliament is presumed not to intend either absurdity or ineffectiveness. If this is so, Parliament must be said to have flagrantly violated international law. On one occasion before the passing of the Act of 1962, the U.K. Parliament temporarily abandoned the principle that a state will always receive its subjects into its territory. That was the Prevention of Violence (Temporary Provisions) Act 1939, section 1 of which allowed the Home Secretary to make prohibition and expulsion orders against persons not ordinarily resident in Great Britain and believed to be concerned in the preparation or instigation of acts of violence (*i.e.*, suspected members of the Irish Republican Army). At that time, a learned writer, who pointed out that this power could be used against British subjects, commented: " this illustrates once again what havoc *ad hoc* legislation can play with those principles which the common law so cherished. . . . For this [duty to admit subjects] is a principle which Great Britain has carefully fostered in the past and the precedent created by its unwitting abandonment will not go unremembered abroad. . . ." [14] The Act of 1968, by contrast to the 1939 Act, is a deliberate and not simply an unwitting abandonment of principle.

The second objectionable feature of the Act is that it confers several new discretionary powers on immigration officers in respect of *all* controlled Commonwealth citizens, but fails to implement the proposals of the Wilson Committee. For example, restrictive conditions of entry may now be imposed on the wives and children of Commonwealth citizens; and a child under sixteen may now be refused admission unless he satisfies an immigration officer that he

[13] The Home Secretary has, in the past, refused to implement recommendations for deportation in respect of citizens of the U.K. and Colonies who are also citizens of a Commonwealth country on the grounds that " everyone has the right to return to his own country." As a result, the courts will not recommend deportation in such cases: *R.* v. *Sabri* [1965] Crim.L.R. 102; *R.* v. *Romano* [1968] Crim.L.R. 688.

[14] Clive Parry, *Annual Survey of English Law*, 1939, pp. 93–94.

is joining or accompanying both his parents (unless one of them is dead).[15] The complex issues which may confront an immigration officer are illustrated by the case of the legitimate child whose parents' marriage has been dissolved, and the illegitimate child, either of whom seeks to join or accompany only one of his parents. Neither of them has a statutory right of entry (until the other parent dies!). The Home Secretary has instructed immigration officers [16] that they may admit a legitimate child under the age of eighteen whose parents' marriage has been dissolved if the parent here has legal custody. This means that among the matters which the officer will have to investigate are: (i) the relationship of the parties; (ii) whether the marriage has been dissolved (a legal or factual separation short of dissolution being insufficient); (iii) who has legal custody of the child (irrespective of what English law would consider to be in the best interests of the child). In the case of an illegitimate child, the instructions require the officer to investigate who has had " sole responsibility " for the child's upbringing, and for this purpose, no doubt, the child's life history will have to be considered. It is matters such as these, as the Wilson Committee pointed out, which are the most difficult tasks facing immigration officers and which most directly justify a system of appeals.[17] Unsuccessful attempts have recently been made to get the courts to upset immigration decisions.[18] The practical value of such applications has been that time has been won in which to obtain fresh evidence to support claims for admission. That such evidence was forthcoming is a powerful argument for a regular system of appeals on matters not simply of form (to which the courts are limited) but of substance. The *ad hoc* system of appeals set up in Nairobi by the Home Secretary is extra-legal, and is confined to those U.K. citizens whose rights were taken away by the Act of 1968. It will deal with " Home Office matters " (*e.g.*, whether a person is within the extended scope of the control, whether he is a student, visitor, etc.) but not appeals against the refusal of a voucher.[19] This is no substitute for comprehensive legislation covering all immigrants.

Finally, there are the criminal aspects. Section 8 creates a new offence which is committed by a Commonwealth citizen (who is subject to controls) who either (i) has not been examined by an immigration officer while on board a ship or aircraft from which he lands in the U.K., or (ii) lands otherwise than in accordance

[15] s. 2 (1) of the Act of 1968.
[16] Cmnd. 3566, para. 2.
[17] Wilson Report, pp. 6, 8, 9, 27–29.
[18] *e.g.*, *Re H.* (*K.*) (*An Infant*) [1967] 2 Q.B. 617 (immigration officer had acted " fairly "); *Hanif* v. *Secretary of State for Home Affairs*. *Singh* v. *Sams*, *The Times*, March 18, 1968 (court's wardship power ousted by Act).
[19] H.C.Deb., Vol. 759, cols. 1252–1254; 1506–1505. The first two lawyers considering these appeals are Sir Derek Hilton and Mr. Trevor Reeve, Q.C. An attempt to introduce a system of appeals (to magistrates) failed: *ibid.*, cols. 1671–1681.

with arrangements approved by an immigration officer, or on landing does not submit to examination in accordance with those arrangements. Subsection (4) creates a presumption that the accused has landed in contravention of this provision unless he produces a passport duly stamped within the requisite period by an immigration officer. The Home Secretary has the power to exempt persons landing in circumstances which may be specified and this will enable him to exclude those travelling within the common travel area formed by the U.K., the Channel Isles, the Isle of Man and the Republic of Ireland. But even the most detailed order is unlikely to exclude all those who have no intent to evade immigration controls. For example, a person who takes part in a cross-channel boat race and lands at an isolated coastal beach and is either unaware of the obligation to submit to examination or carelessly forgets to do so commits an offence. He will have to prove his innocence, and this he cannot do because his passport has not been stamped. (Cross-channel swimmers need not be deterred, since it is still necessary for the Crown to prove that the accused landed from a ship or aircraft!) These difficulties and injustices could have been avoided by the simple expedient of requiring the Crown to prove an intent to evade immigration controls: a matter which would occasion little difficulty in the case of the man who lands in suspicious circumstances.

These features of the Act illustrate the evils of *ad hoc* legislation, particularly where it is directed against the fundamental rights of a particular group of citizens. They also add up to an unanswerable case for a thorough investigation of the whole patchwork of immigration control. As pointed out in the last issue of this *Review*,[20] it is only when the substantive law is rationalised that the procedural improvements advocated in the Wilson Report will be of real value.

B. A. Hepple.

[20] (1968) 31 M.L.R. 310 at p. 320.

REPORTS OF COMMITTEES

Report of the Committee on the Age of Majority

Committees appointed to consider the desirability of reform of the law rarely produce reports which can be described as major social documents. This is not because their proposals are socially unimportant—their implementation often has a profound effect on the lives of ordinary citizens—but is no doubt largely due to their customarily narrow terms of reference, the over-emphasis on juridical experience as a qualification for membership, and the paucity of social data assembled in support of their conclusions.[1] The report of the Latey Committee,[2] happily, does not conform to this traditional pattern. Appointed to consider the broad aspects of wardship and the contractual, proprietary and matrimonial powers of infants, the Committee has assembled an impressive volume of expert and factual evidence to supplement the already extensive common knowledge and experience of its widely selected members, and has produced a comprehensive report written in a lively and occasionally humorous style containing proposals which are realistic, sensible and, not surprisingly, highly controversial. Despite its weaknesses it has rightly been acknowledged as an invaluable basis for major reform of the law which governs infants.[3]

In one sense the Committee's task was made easier by the decision to concentrate on the social aspect of their work, namely, the age at which full legal capacity and responsibility should begin. Even if the Committee's major proposal that this should be reduced from 21 to 18 years is not found generally acceptable, the law would be greatly improved by the early implementation of the detailed and eminently sensible recommendations for the technical reform of the procedure and machinery relating to applications for consent to marry, wardship, custody and maintenance of infants, the enforceability of infants' contracts, testamentary capacity and subsidiary topics where the law makes a distinction solely on the basis of age. Although two members [4] of the Committee were impelled to prepare a minority report by their unwillingness to accept the majority's conclusion that the age of majority should be lowered to 18 years, a glance at the summary in Part VII of the Report, where the unanimous recommendations are conveniently identified, and a close study of the minority's views on contractual capacity show that the

[1] *Cf.* P. S. Atiyah's comments on the Twelfth Report of the Law Reform Committee in (1968) 29 M.L.R. 541.

[2] Cmnd. 3342.

[3] See the debates in both Houses of Parliament: H.C.Deb., Vol. 754, cols. 956–1028; H.L.Deb., Vol. 286, cols. 1047–1134. The Attorney-General has recently announced the Government's intention to introduce legislation to implement most of the recommendations: H.C.Deb., Vol. 762, cols. 1401–1408.

[4] Mr. Geoffrey Howe, Q.C., and Mr. J. C. Stebbings.

gap between them is not as wide as might be expected. The area of apparently irreconcilable conflict is really confined to the age of free marriage where there is ample scope for legitimate differences of opinion and the factual evidence is less favourable to the neccessity or desirability for fundamental reform. Having regard to these considerations and certain unconvincing aspects of each side's arguments, the occasional reproachful comments of the majority seem petty and unjustified.[5]

The majority's view that the age of majority should be reduced by three years is based largely on their ". . . assessment of the young today, how they live, what they need, what they are like and how mature they are" (para. 84). There is a weighty and respectable body of social facts which emphasises the force and validity of conclusions derived from this approach. But it is an essentially static view of society and tends to overlook or minimise the changes which may and do take place in any developed and mobile society, and the influence which a decision today on the age of majority may have on the development of future generations. The reasons for selecting 18 as the legal watershed in life may become just as irrelevant as the historical explanations for the present age of majority. By its failure to look beyond the past and present[6] and to express more positively its confidence that the greater freedom which it considers ought to be conferred on the youth of today, who, according to the preponderance of expert evidence, are sufficiently responsible not to squander it, will not cause hardship to the young, the Committee has, perhaps, not made the best use of its opportunity to persuade those who do not share the same optimism or who are not convinced that there is any pressing need for change. Critics of the Committee's more controversial proposals will not be found solely in the ranks of those who are traditionally disposed to adopt a cautious distaste for all liberalising reform; even sympathetic " floaters " will find much to criticise in the Report.

There are certain features of the Report which are likely to cause some embarrassment to its advocates and furnish ammunition for its opponents. At times one detects a tendency to adopt a different critical approach to the assessment of evidence in favour of the *status quo* than that applied to opinion in support of change, instead of recognising that such conflicts may be due largely to the sincere but subjective impressions of individual experts or organisations, and in one instance there is a somewhat undignified attempt to

[5] See para. 25 and 95.

[6] This is indicated by the omission of any reference to current proposals for reform of the divorce laws, and the absence of any discussion of the problems which might arise if the United Kingdom enters the Common Market. It is also interesting to see that in the fascinating list of significant ages under 21 in English law (Appendix 4) there is no reference to the possibility that in 1970 a person may be liable to suffer the penalty of death for murder on attaining the age of 18, if the Murder (Abolition of Death Penalty) Act 1965 is not extended.

escape the almost inevitable conclusion of the logic of the Report. The majority suggests five main weaknesses in the opposing evidence.[7] Whilst it may be possible to reject the views of some witnesses on the grounds that they are coloured by distorted views of the young, vague notions of immaturity, or stem from persons who deal with the young in their least attractive aspects or in the realm of higher education or because they belong to the class of generous persons who wish to protect everybody, this hardly applies to some of the expert evidence.[8] What is more important, however, is the fact that the majority appears to suggest that those experts [9] who favour a reduction in the age of majority do not also display these weak characteristics in spite of the fact that some of these criticisms could easily apply to their evidence. Furthermore, in its treatment of the non-expert evidence, to which these comments may be more appropriate, the majority appears to suggest that those who favour reduction of the age of majority are worthy of more respect and attention than those who consider that there is no urgent need for change.[10] This is clearly demonstrated by the attitude adopted to the results of the survey carried out by the National Opinions Polls Ltd.,[11] which suggested that at least two out of every three in the age group of 16 to 20 thought that 21 was the right age for signing hire-purchase contracts, buying and selling their own houses, and marrying without the need to obtain anyone's consent. This expression of opinion is rejected because it was not known how many of those interviewed were " interested " or " involved " and because most of them were not living away from home.[12] This feeble attempt to discredit what may be unreliable evidence is certainly not strengthened by the failure to indicate how many of the individual correspondents and those who supplied the material for surveys conducted by schools and colleges lived away from home, and no regard appears to have been paid to the real possibility that such persons may be " interested " or " involved " mainly because their views have been conditioned by resort to hackneyed slogans like " Old enough to die for your country . . ." which the Committee rightly rejects as irrelevant.[13]

[7] paras. 96–100.

[8] This includes evidence from the Bar Council, Law Society, Nat. Ass. of Probation Officers, Nat. Ass. of Youth Clubs, S.S.A.F.A., Citizens' Advice Bureaux, Salvation Army, the Official Solicitor, the Catholic Marriage Guidance Council, and the Free Church Federal Council.

[9] These include the Association of Municipal Corporations, Nat. Fed. of Housing Societies, Justices Clerks' Society, Church of England Board for Social Responsibility, Marriage Guidance Council, town clerks, High Court judges and probation officers(!).

[10] Is it fair to stigmatise the attitude of those who feel that any restraint or handicap to early marriage should be kept as roughly that of the old saw: " Advice to those about to marry: don't "? (para. 138).

[11] See Appendix 9.

[12] *Cf.* paras. 91 to 93. Oddly enough, elsewhere in the Report, the Committee attempts to turn this unreliable evidence to its own advantage: see para. 171.

[13] *Cf.* para. 124. Incidentally, the reference to children of three being compelled to die for their country in the conditions of modern warfare, seems quite

Although one cannot criticise the Committee for not recommending that a person should be able to assume full civic duties at the age of 18, since the age for voting and related matters were excluded from their terms of reference, their basic argument for reducing the age of majority is considerably weakened by their unconvincing attempt to jusify retention of a higher age limit for civic responsibilities.[14] The reference to the practical or legal requirements as to the minimum age for becoming Prime Minister or President of the United States [15] seems totally irrelevant in the face of the evidence that 18-year-olds are sufficiently mature and responsible to enter into burdensome contracts, to own and manage property for themselves and others, and to withstand the stresses and strains of early marriage and parenthood. Less harm would have been done to the Committee's strong plea for greater freedom for the young by a frank recognition that the age for voting, in particular, is likely to be determined more by party political considerations than by rational discussion of the fitness of individuals to discharge the privilege of enfranchisement intelligently and responsibly. These criticisms may sound like mere debating points, but having regard to the tone and style of the Report, in which the skills of the advocate and journalist are exploited to the full, they may serve to draw attention to matters which will require careful consideration in future legislative deliberations.

It has already been indicated that the most controversial aspect of the Report is the recommendation that the need for consent to marry should cease at the age of 18. This is borne out by the debates in Parliament and by the obvious concern at the fact that the failure rate among teenage marriages is alarmingly high and likely to increase. It is unfortunate that the Committee has not considered the possible effect of recent proposals to alter the basic doctrine of the law relating to divorce. This, if implemented, may not make divorce easier to obtain but it must surely have a considerable impact upon the notion that marriage is a permanent union and therefore more likely that this contract will be entered into more readily and without serious thought about its implications and consequences. Furthermore, although some of the experts who favoured a reduction in the age for free marriage are closely concerned with marriage, it is fairly clear that the Committee's

irrelevant, and the Committee appears to forget that this hackneyed phrase is frequently related to the minimum age for capital punishment. Having rejected the argument based on the age for compulsory military service, in the next breath it is cited as a factor supporting 18 as the most suitable age of majority! (para. 125 (5)).

[14] See paras. 22–25. The Committee's views on this question no doubt fortified the members of the Speaker's Conference on Electoral Law (Cmnd. 3550, February 1968) in their rejection by 22 votes against 8 of 18 as the age for voting. By a vote of 24 to 1 they recommended reducing the age of voting to 20 years.

[15] The validity of this point is somewhat doubtful in view of the Committee's decision not to be influenced by foreign law: *cf.* paras. 51–58.

views were substantially influenced by other evidence from experts and others whose main interest lies in the commercial field, where the young seem undeniably just as responsible as their elders. There is surely a good case for separating the question of matrimonial capacity from contractual and proprietary freedom and discussing it in the general context of reform of the law relating to divorce and other family relationships. This could be done as a matter of convenience without destroying the obvious benefits to be derived from greater uniformity in laws based on age distinctions. One cannot deny that the legal power of veto which parents can exercise in respect of their children is sometimes unreasonably exercised, with unfortunate consequences. But is it (or the application to a court) so entirely devoid of usefulness? Since the statistics relating to applications to the courts for consent to marry do not show how many are due to objection by parents who are not interested in, or in a position to control, their children, is there any evidence that it is the force of parental persuasion which prevents unwise marriages in the case of those over 18, whereas it is parental objection which discourages marriage under 18 where the risk of failure is greater? [16] Whilst the need to apply to the magistrates for consent to marry may harden relationships generally, it can also serve to demonstrate to an unreasonable parent just how unfounded and unreasonable his objections may be, and having been overruled by a body of persons who might be considered more likely to understand and sympathise with his feelings, he may be encouraged to give more helpful advice and support when difficulties arise after the marriage. The present formal arrangements tend to encourage parents to abandon their moral obligations once their legal rights or obligations have ceased or been prematurely determined. A case can be made for greater use of the requirement of obtaining consent or approval from some independent tribunal in order to educate parents not to exert their power or influence for selfish motives and to emphasise the community's legitimate interest in marriage. The procedure could be made more informal and the tribunal (for want of a better word!) could be composed in part of persons having a greater knowledge of the families involved, such as relatives, priests, teachers or other close friends.[17] If necessary, the "litigants" could be allowed to nominate their own "arbitrators" to sit with a completely independent chairman. Even if no such radical change is considered desirable, the Committee's recommendation that such applications should be heard in private would do much to remove

[16] *Cf.* paras. 105 and 169. One wonders how many parents are really forced to give consent because of a threat to "start a baby" as the Committee seems frequently to suggest: see paras. 68, 158 and 162. It is doubtful whether even the irresponsible minority *deliberately* decide upon an early pregnancy as means to obtain consent to marry.

[17] The views expressed in para. 185 (4) seem to suggest that the Committee might be attracted by this idea. They unanimously rejected compulsory betrothal as a substitute for parental consent: paras. 178–188.

the unsatisfactory features and consequences of the existing machinery.[18] On the question of free marriage there is clearly a need and scope for further thought, and one must concede that on this issue the minority has a stronger case. The fact that the majority concludes with a call for further education in social and personal relationships and in preparation for family life, particularly in the schools,[19] is perhaps an indication that it recognises that its arguments for greater freedom in this field are not as strong as in others.

Whilst the Committee shares the almost universal condemnation of the law relating to infants' contracts, and puts forward sensible suggestions [20] for reform of this confused area based on the proposal that such contracts should be generally unenforceable against infants, subject to a liability to account for benefits received or to make restitution in appropriate cases, many of the existing difficulties would be removed by conferring full contractual capacity on those who have attained the age of 18 years. The only reservation which the Committee appears to have had was the fear that teenagers would be exposed to the sharp practices of some traders who would be only too ready to take advantage of their inexperience.[21] It may be over-optimistic in hoping that this problem should be attacked as part of a general policy of ensuring greater protection for all consumers, and it is on this issue that the views of the minority deserve more attention. They suggest that contracts made by persons should be binding subject to a power to obtain relief if it can be shown that it is harsh or oppressive or ought to be set aside to such extent that the court thinks just and equitable.[22] This type of formula does not appear to have affected the sanctity of adults' contracts in other fields or to have presented any real problem on their freedom to enter into necessary contracts. It would be unlikely to result in infants being treated differently by traders on the principle that "no shopkeeper willingly buys a law suit." If the evidence on which the Committee heavily relies is to be accepted as accurate and sound, the existing disabilities of infants have not discouraged traders from granting credit to young customers. Furthermore, the many statutory provisions designed to protect the consumer do not appear to inhibit traders from entering into contracts which may become unenforceable because of some sharp practice or over-enthusiastic selling. Is it likely that the possibility that an infant may be able to obtain relief from the court in respect of an unwise contract will make any appreciable difference to the willingness of traders to do business with young persons, who have generally shown themselves to be more reliable than their elders?

[18] para. 185 (3).
[19] paras. 186–191.
[20] *Cf.* paras. 292–377.
[21] *Cf.* paras. 278–280.
[22] *Cf.* paras. 591–598.

Whatever decision is finally reached on the age of contractual capacity, the recommendations of the Committee on infants' contracts could usefully be implemented without delay, if only to get rid of the thoroughly unsatisfactory Infants Relief Act 1874 and the vague concept of " necessaries " with all its overtones of wealth and social distinctions. In this essentially technical area, however, one would have welcomed a more precise expression of opinion on an infant's liability for negligence. This matter was left open by the Committee,[23] and the fact that they seem to regard liability under the Misrepresentation Act 1967 as purely tortious, when it is clearly closely connected with contract, implies that they did not pay due regard to the growing importance of negligence as a means of regulating human conduct generally.

In spite of its weaknesses, to which some readers will attach greater significance than others owing to the nature of the subject and its inherent potentiality for arousing strong feelings among the middle-aged, this Report fully deserves the welcome it has received and should prove an invaluable basis for future legislation. It is right that its defects should be exposed because legislators, in spite of cherishing their exclusive freedom to debate and enact measures on the basis of their own experience and sources of knowledge,[24] tend more and more to rely on the labours of small groups of experts who have had an opportunity of considering problems in more favourable and leisurely circumstances.

BERNARD DOWNEY.

REPORT OF THE SELECT COMMITTEE ON PARLIAMENTARY PRIVILEGE

IN recent years the House of Commons has come to realise that " a rather longer and cooler look " than those accomplished by the Committee of Privileges " should be given to the whole subject of parliamentary privilege." [1] This Report is the result of the longer and cooler look. The opportunity has been taken to clear obsolete rules out of the cupboard, *e.g.*, the rule prohibiting reports of proceedings of the House,[2] and it is proposed that out-of-date rights and immunities be discarded.[3] Major changes are recommended in

[23] *Cf.* paras. 855 and 856. The committee recommend that an infant should be liable for deceit unconnected with his age even if it would result in the indirect enforcement of a contract, but that the immunity for deceit as to age should continue: paras. 850–854.

[24] A typical example of this reaction can be found in the recent debate on the Theft Bill: *cf.* H.L.Deb., Vol. 289, cols. 1307, 1311.

[1] Rt. Hon. Herbert Bowden, M.P., moving the appointment of the Select Committee, July 5, 1966 (H.C.Deb., Vol. 731, col. 868).

[2] Rules are proposed to regulate reporting of the proceedings of Committees of the House and the attendance of strangers at such meetings. *Cf.* a letter to *The Times*, January 21, 1967, from Mr. G. R. Strauss, M.P.

[3] i.e., freedom from civil arrest, the right to impeach, immunity from attendance as witness and from appointment as sheriff. Immunity from jury service would be retained, as would most of the House's corporate rights.

the remaining law and procedure of parliamentary privilege as it affects the House of Commons, and it will be with these changes that this note will be concerned.

The Committee begins by noting the various criticisms that have been levelled against the present law, the chief of which was that the law lacked definition and certainty.[4] It has gone a long way to meet this criticism. The basis of the Committee's approach has been to balance the interests of the citizen, and of the Press and other information services, with those of the House, its Members and officers. It has "endeavoured to relate the role of 'parliamentary privilege' to the basic requirements of a modern legislature," [5] and has been concerned to determine "the reasonable limits of protection and immunity which must be claimed if the legislature is to fulfil its proper functions. . . ." [6] Although one may have reservations about some of the proposals, such an approach can hardly be faulted.

It is proposed that the misnomer "parliamentary privilege" be replaced by "the rights and immunities of Parliament," and that the House should in future refer to offences against these rights and immunities as "contempts"; the term "breach of privilege" would disappear. In line with these two changes the Committee of Privileges would be renamed the Committee of House of Commons Rights.

On the question of framing a code of contempts the Committee was persuaded that the possibility of "new forms of obstruction, new functions and new duties" arising, which could all "contribute to new forms of contempt," [7] made such a proposal unacceptable. Instead the Committee proposes a general definition of contempts: ". . . such improper obstruction or attempt at or threat of obstruction as is causing, or is liable to cause, substantial interference with the performance . . ." of the functions of the House, its Members or officers.[8] Furthermore, ". . . the House should be slow and reluctant to use its penal powers to stifle criticism or even abuse . . . however strongly the criticism may be expressed and however unjustifiable it may appear to be."[9] Punishment for contempt is clearly to be regarded as a weapon of last resort.[10] In cases where a Member's complaint, if justified, would give rise to an action in the courts "he should not be permitted to invoke the penal jurisdiction of the House in lieu of or in addition to the exercise of that remedy." [11] It is considered, though, that

[4] See, *e.g.*, the memorandum of the General Council of the Bar, p. 169. (Arabic numerals refer to the appendices of the Report, Roman numerals to the text.)
[5] Para. 11, p. vii.
[6] *Ibid.*
[7] Para. 40, p. xiv.
[8] Para. 15, p. x.
[9] Para. 45, p. xv.
[10] The House has, however, in this century used its powers sparingly: see appendix to memorandum of the Clerk of the House, pp. 24–27.
[11] Para. 42, p. xv.

a residual power of punishment should be retained: " . . . a point may be reached at which conduct ceases to be merely intemperate criticism and abuse and becomes or is liable to become an improper obstruction of the functions of Parliament." [12] Such powers could be used to stop an unjustifiable and sustained Press campaign that would prejudice the " free expression of [Member's] consciences." [13] When pursuing his remedy in the courts the Member would not be allowed any advantage, particularly he should not be permitted to resort to invoking the House's penal powers to forestall a good defence mounted by his opponent; such action " would be an indefensible abuse of power." [14]

In cases where a Member is the defendant in an action for libel or slander it is proposed that similar considerations would apply. In most cases, of course, the Member would have the defence of absolute privilege, in other cases, " unless the circumstances are exceptional," the Member should not be able to " claim immunity from the normal processes of the courts." [15] In particular, the Committee says, " if he has a good defence of ' qualified privilege,' why should Parliament protect him if in fact his conduct was actuated by malice?" [16] The possibility of a parliamentary inquiry is held out to those unjustifiably defamed in the House and met by a defence of absolute privilege and a refusal to withdraw or apologise. However, it would not be available as of right, but only at the discretion of the House. It is a pity that the Committee could not have been more generous here—it is difficult to appreciate what the House has to lose.

A major reform is the proposal that the House recognise the defences of " truth " and " fair comment " to charges of contempt. The Committee is alive to the possible abuse of the former defence and accordingly proposes that it should be limited to matters of public interest. " There may be circumstances in which it is manifestly not in the public interest to make [the statement], or in which the width and manner of publication extend far beyond what could reasonably be regarded as necessary or proper in the public interest." [17] Such a restriction is, at least in the opinion of the present writer, the corollary of the defence of truth: the law of defamation has something to learn here. The matter is not left here, however, as the Committee did not believe " that the interests of Parliament [were] best served by insisting that critics should be insurers of the truth of their criticisms." [18] Thus an honest and reasonable belief in the truth of a defamatory allegation would be a sufficient foundation for the defence. In the context of defamation such a proposal is truly liberal, even if it does look strange

[12] *Ibid.*
[13] Para. 44, p. xv. These powers could also be used in cases of group defamation.
[14] Para. 46, p. xvi.
[15] Para. 47, p. xvi.
[16] *Ibid.*
[17] Para. 55, p. xviii.
[18] Para. 57, p. xix.

under the name " fair comment " which is proposed for it. There may, nevertheless, be another moral here for the common law.

Dealing with the vexatious " proceeding in Parliament " the Committee decline to frame a general definition; instead they propose that the various " proceedings " be categorised according to whether they would enjoy absolute or qualified privilege in the law of defamation. The most notable inclusion in the former category is communications between Members and Ministers. The Committee thus disagree with the decision in the *Strauss* case.[18a] Letters from electors would be qualifiedly privileged. It is to be noted that in all cases privilege would arise so long as the communicator had a reasonable belief that the communication fell within the functions of the person to whom it is addressed.

Criticism was levelled at the House's exercise of its penal powers on the ground that it was contrary to natural justice that the House should be judge in its own cause.[19] However, the suggestion that this jurisdiction be transferred to the courts was rejected. Contempts might involve matters of a political character which the House alone ought to judge, and the possibility of conflict between the courts and the House would be increased. Instead the Committee proposes new procedures for exercising the penal powers. In this it has been concerned to reduce to a minimum the publicity attendant on the raising of a complaint; to discourage trivial complaints, and to provide better machinery for the consideration of genuine complaints; and to save the time of the House. Under the new procedure the initial step would be notification of the complaint to the Clerk of the Committee of House of Commons Rights. The Committee, or normally a small section of it, would then give a prima facie ruling on the merits of the complaint.[20] In appropriate cases the complaint would then go to the full Committee for investigation. Where the preliminary decision is adverse to the complainant he could, provided he had the support of fifty Members, appeal to the House to reverse the decision. At the hearing before the full Committee the complainant and the person accused would have greater procedural safeguards than at present. Notice of charges would be given to the latter, as well as copies of all relevant documents. Representation and the rights to call witnesses and to have legal aid would be allowed at the discretion of the Committee. Both parties would, if they wished, be present throughout the proceedings, unless the Committee decided otherwise. These proposals are a distinct improvement

[18a] (1958) H.C. Deb., Vol. 480, col. 208. However, the Committee approve the decision on other reasoning.

[19] Although, as the Clerk of the House pointed out in his oral evidence, " the House has been a very lenient judge in its own cause " (p. 86, Q. 39). *Cf.* note 10.

[20] The preliminary jurisdiction of Mr. Speaker would be abolished. He would, however, retain certain other powers.

on present arrangements,[21] but the retention of discretionary powers over such matters as attendance and evidence denies an essential element of the judicial characteristics which, it is submitted, the Committee ought to have.[22] Whether the procedure, nevertheless, complies with the *audi alteram partem* rule is open to doubt.[23] In practice, it is not thought that the proposed arrangements would give rise to much cause for complaint. If the Committee finds the complaint justified it would, as now, recommend the action to be taken by the House. Regarding punishments, it is proposed that imprisonment should be for a fixed period, subject to a legal maximum, and should not be affected by the termination of a session. It is also proposed that the House have power to fine.

In their final section dealing with lobbying, the Committee recommends that a Member should disclose any financial interest which he has in any matter upon which he speaks, " failure to do so without good cause " would be " capable of amounting to a contempt." [24]

In all the Committee proposes twenty-four major changes to the present law which together bring the law of parliamentary privilege up to the requirements of a modern legislature. Two general points are worthy of note: in many cases the Committee realises the need for legislation to give effect to its proposals; secondly, it has been concerned to minimise the areas of possible conflict between the House and the courts. It is to be hoped that the Government will give a sympathetic consideration to the Report and speedily provide time for its implementation.

P. M. SILLS.

[21] *e.g.*, in the *Strauss* case the L.E.B. were not heard by the Committee of Privileges. In their reforms the Select Committee proceeded on the basis that the functions of the Select Committee of H.C. Rights were analogous to those of a Tribunal of Inquiry.

[22] The Select Committee do not agree. In their view the investigation of complaints should not be regarded as a trial. (*Cf.* note 21.) The Select Committee of H.C. Rights corresponds, subject to the qualification that its findings be approved by the House, to the definition of a judicial body in the Report of the Committee on Ministers' Powers (Cmd. 4060, p. 78 (1932)). *N.B.* In cases where these rights are denied the Committee will have to give reasons in its report to the House for so deciding.

[23] At least until the House of Lords clarifies the distinction between such cases as *Local Government Board* v *Arlidge* [1915] A.C. 120, *Board of Education* v. *Rice* [1911] A.C. 179 and *Ridge* v. *Baldwin* [1964] A.C. 40.

[24] Para. 203, p. xlviii.

NOTES OF CASES

Inducing Breach of Contract and Unlawful Interference with Trade

The economic common law torts go marching on, and their judicial development, which began anew in the 1960s, bounds ahead with unpredictable results for commercial and, especially, industrial relations. In respect of the latter, it must surely be accounted unfortunate if, just at the moment when the Donovan Royal Commission is finalising its Report, the judges see fit to open up new avenues to liability in trade disputes. The development has now been continued by the Court of Appeal in *Daily Mirror Newspapers Ltd.* v. *Gardner* [1] and, in Scotland, by Lord Milligan in the second decision of *Square Grip Reinforcement Ltd.* v. *Macdonald.*[2]

The *Daily Mirror* case concerned two distinct torts. After a price increase, the newspaper demanded that wholesalers take a smaller margin of profit; and the wholesalers therefore made the same request of the retailers. The National Federation of Retail Newsagents objected and decided on " a complete and utter boycott of the *Daily Mirror* for one complete week, as an initial step "; sent out " stop notices " for its members to send to wholesalers discontinuing supplies of the *Daily Mirror* from March 18 to 23; and distributed posters to be displayed for customers to read saying: " Trade Dispute. No *Daily Mirror*." [3] Both the Federation and the *Daily Mirror* had " good commercial reasons for the stand " they took.[4] But had the Federation acted unlawfully in a way which entitled the *Daily Mirror* to an injunction? Cooke J. and Phillimore J. had so held, and the Court of Appeal agreed, because (a) the Federation had interfered with the plaintiffs' trade by unlawful means; and (b) the Federation had knowingly and intentionally induced breaches of contract to the damage of the plaintiffs.

(a) As to the first tort, it seems to be established law that if defendants use " *unlawful means* " intentionally to damage the trade of the plaintiff, they are liable even if they do not induce actual breach of an existing contract.[5] The tort usually merges

[1] [1968] 2 W.L.R. 1289 (C.A.). Also reported [1968] 2 All E.R. 163.

[2] 1968 S.L.T. 65 (No. 2). [For reasons of space the note on this decision is held over until the next issue.] The decisions have appeared at a time when labour law litigation has flared up strikingly. At the time of writing judgment is awaited from the Court of Appeal in *Morgan* v. *Fry*, decided by Widgery J. [1967] 2 All E.R. 386. See too Stamp J. in *Torquay Hotels Ltd.* v. *Cousins, The Times*, May 24, 1968 (where liability was imposed for interference with commercial contracts short of inducing a breach).

[3] [1968] 2 W.L.R. 1289, 1247.

[4] [1968] 2 W.L.R. 1289, *per* Lord Denning M.R. at p. 1248.

[5] This is one ratio of the speech of Lord Reid in *Stratford* v. *Lindley* [1965] A.C. 269, 324 (" interference with business is tortious if any unlawful means are employed," referring to *future* contracts).

into " conspiracy to use unlawful means." Were *unlawful means* used here? The Court of Appeal held that the answer lay in the status of the arrangement made by the Federation to effect its purposes. By virtue of the Restrictive Practices Act 1956, s. 6 (7), the recommendation to retailers was a " relevant restriction " under that Act and an arrangement which was therefore registrable under the Act and which could be brought before the Restrictive Practices Court. Furthermore, the " inevitable result " of earlier authority [6] was that such a " restriction is to be regarded as contrary to the public interest although not yet formally so declared by the Restrictive Practices Court." [7] The Court of Appeal was prepared to take its own view as to the effect of the 1956 Act and decided that the restriction could not achieve legitimacy via the " gateway " of section 21 (1) (*d*) of the 1956 Act. This section allows proof in the Restrictive Practices Court that a restriction is

> " reasonably necessary to enable the persons party to the agreement to negotiate fair terms for . . . the acquisition of goods from any one person . . . who controls a preponderant part of the trade or business of . . . supplying such goods."

It was argued for the defendants that the *Daily Mirror* was a subsidiary of International Publishing Corpn., a company which controlled a preponderant part of the trade, supplying the goods through its group. Unfortunately section 21 (1) (*d*) speaks of negotiation of fair terms for acquisition of goods by buyers from sellers. The Federation and its members did not buy from I.P.C. True, section 8 (9) of the Act enacts that subsidiary and parent companies are to be treated as a single person for some parts of the statute; but those do not include section 21 (1) (*d*).[8] This contention of the defendants therefore failed.

Here, then, was an agreement deemed to be " contrary to the public interest " and to be treated as if it were found to be so by the Restrictive Practices Court. With varying degrees of enthusiasm their Lordships assumed that this meant it constituted in tort " unlawful means." [9] But it is to be remembered that the legislature expressly refrained from declaring such agreements illegal and only dubbed them " void." [10] There is authority for saying that not every action which the law finds (to use a neutral word) improper constitutes " unlawful means " in tort. For example, use

[6] *Re National Federation of Retail Newsagents, etc., Agreement* [1965] L.R. 5 R.P. 236 (the " Romeo " decision).

[7] [1968] 2 W.L.R. 1289, *per* Russell L.J. at p. 1254. As to registrable arrangements and the relationship between the High Court and the Restrictive Practices Court see Whiteman (1968) 29 M.L.R. 563 and (1967) 30 M.L.R. 398.

[8] Why this is so is not clear: perhaps an amendment to the pending Restrictive Trade Practices Bill 1968 will provide for this point.

[9] Russell L.J.: " as at present advised " [1968] 2 W.L.R. at p. 1255.

[10] s. 20 (3) of the 1965 Act, which allows the court to make orders restraining the parties from giving effect to the restrictions found contrary to the public interest.

of vexatious litigation probably does not.[11] The mere fact that acts are in contempt of court do not constitute them unlawful means to found an action in tort.[12] Indeed, in *Davies* v. *Thomas* [13] (which seems not to have been cited in *Daily Mirror* to the court) the Court of Appeal itself rejected a claim by a plaintiff deliberately injured by acts done pursuant to an agreement which was " unlawful " to the extent of being in restraint of trade at common law, and refused to say that the defendants were engaged on an unlawful conspiracy. Nor is it clear that every breach of any statute renders activity an " unlawful means " for the law of tort, or a combination which commits such a breach necessarily a tortious unlawful conspiracy. On this the authorities are far from clear. It is uncertain how far the court will take account of the fact that the plaintiff cannot himself sue for the breach of statutory duty as such [14] or that the proper remedy may be a relator action joining the Attorney-General.[15] No exploration of these authorities took place in the *Daily Mirror* case and that alone suggests that on this point it may not be a wholly satisfactory authority. The scope of " unlawful means " in the law of tort remains uncertain.

(b) The second ground on which the defendants were made liable to the injunction was for inducing breach of the commercial contract between the *Daily Mirror* and the wholesalers. Proof of the terms of the contract was " meagre " and " tenuous " for it did not exist in writing.[16] But the court inferred from the course of dealing that some contract existed for supply of the newspaper which wholesalers could terminate only on reasonable notice. They had no right merely to suspend the contract for a week, just as a worker cannot suspend his contract and, as Lord Denning M.R. put it, " cannot say: 'I am going to stay away one day,' just to please himself. If he does stay away for a day, he is guilty of a breach of

[11] Lord Watson, *Allen* v. *Flood* [1898] A.C. 1, 105. Presumably after *Rookes* v. *Barnard* [1964] A.C. 1129, mere breach of contract is a tortious " unlawful means "; but see the difficulty raised by Lord Devlin at p. 1210 discussed at (1964) 27 M.L.R. 268; and see Weir [1964] Camb.L.J. 225. The logical consequence of so treating a breach of contract is to turn every *intentional* breach into a tort, a consequence which some jurisdictions face with equanimity (see *Schisgall* v. *Fairchild Publications Inc.* 187 N.Y.S. (2d.) 312 (1955)). But the House of Lords did not stop to consider such incongruities before reversing the Court of Appeal in *Rookes* v. *Barnard*, *supra*.

[12] *Chapman* v. *Honig* [1963] 2 Q.B. 502 (notice to tenant; contempt of court by landlord; no tort).

[13] [1920] 2 Ch. 189, see especially Warrington L.J. at p. 202 and Younger L.J. at pp. 204–205.

[14] In *Cunard S.S. Ltd.* v. *Stacey* [1955] 1 Lloyd's Rep. 247, the C.A. adverted to this point but found the defendants liable for unlawful conspiracy based on breach of the Merchant Shipping Act 1894. Compare *Gagnon* v. *Foundation Maritime Ltd.* [1961] S.C.R. 435 (Wedderburn, *Cases and Materials on Labour Law*, p. 521) and *Williams* v. *Hursey* (1959) 103 C.L.R. 30.

[15] See Street *Law of Torts* (4th ed.) p. 357, and cases cited there; and now *Att.-Gen.* v. *Butterworth* [1963] 1 Q.B. 696, discussed by Winfield, *Torts* (8th ed. Jolowicz and Ellis Lewis), p. 552.

[16] Lord Denning M.R. at [1968] 2 W.L.R. 1948–1949; Davies L.J., *ibid.* p. 1952. See too Russell L.J. at p. 1953.

contract." [17] The defendants had sought to induce the wholesalers to do just that, *i.e.*, suspend by way of breach their acceptance of the paper for a week. (True they had not written to the wholesalers directly; but they had sent out the forms and " stop notices " to their members who were to send them on and act as a kind of conduit pipe for the procurement. This plainly amounted to a direct inducement within the authorities.)

Did they then have sufficient knowledge and intention to bring them within the principle of *Lumley* v. *Gye*? [18] The Court of Appeal had little difficulty in finding sufficient mental element, relying strongly upon the decision in *Emerald Construction Ltd.* v. *Lowthian* [19] for the finding that knowledge of precise contractual terms is not required and that it is enough if the inducer " says to himself: ' Whether it is a breach of contract or not, I care not.' " [20] Nothing could more plainly illustrate the manner in which, since 1964, the language of the courts " considerably lowers this hurdle " as to proof of knowledge.[21] It is a far cry from the old law.[22]

But Lord Denning M.R. went even further:

> " Then it was said that the defendants did not directly interfere with the contracts between the wholesalers and the Daily Mirror. They did not exert directly any pressure or inducement on the wholesalers; but at most they only did it indirectly by recommending the retailers to give stop orders. That is true, but I do not think it is an answer. [Counsel] relied much on the case of *Thomson* v. *Deakin* [1952] Ch. 646. He said that in order to be actionable the interference has got to be direct but as at present advised I think that is an undue restriction of the principle. I associate myself with what I gather to be the view of Lord Radcliffe expressed in the course of argument in *Stratford* v. *Lindley* [1965] A.C. 307 and mentioned in Lord Wilberforce's book on Restrictive Practices, para. 2605. It seems to me that if anyone procures or induces a breach of contract whether by direct approach to the one who breaks the contract, or by indirect influence through others he is acting unlawfully if there be no sufficient justification." [23]

[17] Lord Denning M.R., *ibid.* p. 1249.

[18] (1853) 2 E. & B. 216.

[19] [1966] 1 W.L.R. 691 discussed in detail by Dean (1967) 30 M.L.R. 208, and especially at pp. 211–212.

[20] Lord Denning M.R. at [1968] 2 W.L.R. 1250, confirming his approach in the *Emerald* case. Davies L.J. also expressly approved the well-known passage of Lord Denning M.R. in the *Emerald* case as reported in [1966] 1 W.L.R. 700–701. The dicta go, of course, more to intention than to knowledge. The inducement in the *Emerald* case was direct by reason of Lowthian's letter to Higgs & Hill Ltd.

[21] Wedderburn (1965) 28 M.L.R. 206 discussing *Stratford* v. *Lindley* [1965] A.C. 269; compared with *Thomson* v. *Deakin* [1952] Ch. 646.

[22] Contrast the approach to the need to prove knowledge and intention in *British Industrial Plastics* v. *Ferguson* (1940) 162 L.T. 313 (H.L.) and *British Homophone* v. *Kuns* (1935) 150 L.T. 589 (C.A.).

[23] [1968] 2 W.L.R. at p. 1250. It may be that his Lordship impliedly accepted that in cases of *indirect* inducement there is justification unless the means used are shown to be extraneously wrongful, but he does not say so.

Two comments must be made on this passage. First, the paragraph cited (para. 2605) comes from an Appendix XVI to this well-known book and was written not by Lord Wilberforce but by one only of the three learned authors, who was counsel for the plaintiffs in the *Stratford* case.[24] The Appendix is scarcely satisfactory. The reference to Viscount Radcliffe and the views attributed to him in argument appear not in para. 2605 but in para. 2604 (note 27) [25] but without any page reference to the *Law Reports* (p. 807 being the opening page of the House of Lords report). Paragraph 2605 does argue that there is a " tort of actionable interference with subsisting trade or contractual relations " wider than the principle in *Lumley* v. *Gye*; but the text cites in support only a case which lays down nothing of the kind,[26] and a different passage of Viscount Radcliffe's speech in *Stratford*, where his Lordship was plainly criticising the technicality of the law as it now stands and expressing a view *de lege ferenda*.[27] No report discloses that Viscount Radcliffe in any way suggested that direct or indirect inducement should be treated on the same basis.

Secondly, direct and indirect inducements have always been treated as distinct; and the need to prove extraneous unlawful means was always treated as critical to liability for indirect inducement, after *Thomson* v. *Deakin*,[28] in all the cases and textbooks. Recently misunderstandings have begun to emerge as to the effect of the *Stratford* case.[29] By some, *Stratford* v. *Lindley* has been thought to affect the authority of the *Thomson* decision. Nothing could be further from the truth. The element missing in *Thomson* was found to be present in *Stratford* (*i.e.*, " unlawful means," *viz.*, breach of customer's workmen's employment contracts), so that a case of indirect inducement could easily be made out in respect of the commercial contracts of hiring. But Lord Pearce treated the facts differently. For him *Stratford* was a case of *direct* inducement because the defendants wrote their letter proclaiming the

[24] See Wilberforce, Campbell and Elles, *Restrictive Trade Practices* (2nd ed.), Preface, p. v.

[25] *Ibid.* p. 788. In [1968] 2 All E.R. at p. 168, Lord Denning is reported as saying: "I associate myself with what I gather to be the view of Viscount Radcliffe expressed *in the course of his opinion* in *J. T. Stratford and Son Ltd.* v. *Lindley*, [1965] A.C. 269 at p. 330, mentioned in Lord Wilberforce's book on Restrictive Trade Practices and Monopolies (2nd Edn.) para. 2605 " (italics supplied). The passage referred to is set out in note 27 below; but it does not support the argument. The transcript of his Lordship's judgment is identical with the report in [1968] 2 W.L.R. p. 1250.

[26] *B.M.T.* v. *Salvadori* [1949] Ch. 556, which was a straightforward case of a conspiracy to induce breaches of contract.

[27] [1965] A.C. at pp. 330–331: " I cannot see that it is a satisfactory state of the law that the dividing line between what is lawful and what is unlawful should turn just along this contour [*i.e.*, inducing breach of contract]. . . . In my opinion the law should treat a resolution of this sort according to its substance without the comparatively accidental issue whether breaches of contract are looked for and involved . . . and by its substance it should be either licensed, controlled or forbidden." [28] [1952] Ch. 646.

[29] Some of these misunderstandings are adumbrated in Winfield, *op. cit.*, p. 542, and in Street, *op. cit.*, pp. 345–346.

embargo " to the Association . . . which in effect represented the hirers." Lord Pearce therefore did not need to make any decision as to further unlawful means,[30] whereas the other Law Lords did. The parallel with *Daily Mirror* is striking—in one case, a letter sent to a Trade Association which is used as a post box to its members; in the other, letters and " stop notices " sent by a Trade Federation to its members who are used as a post box for forwarding them on to the wholesalers. Both can be put within the category of direct inducement; and, as Lord Pearce remarked, the fact that letters are couched as an " embargo " rather than in terms of " seduction " matters not at all.

The remarks *obiter* of Lord Denning M.R. are, therefore, surely to be understood merely as a reply to a submission by counsel that the Federation could not be made liable unless it had contacted the wholesalers itself rather than use its members to communicate with them. In that sense his Lordship is merely denying that *this* alleged " indirect " communication was in any separate category. Where A uses B to *communicate* an inducement to C the case is, in law, one of direct inducement. Counsel was trying to squeeze such facts under the umbrella of *Thomson* v. *Deakin* and that he plainly could not do.

It is worth commenting here that the *reason* why an " indirect " procurement of breach of contract stands on a special footing is connected with commercial matters quite outside the employment field. If A knows that X has a contract for the sale of certain goods to Y, there has never been anything unlawful in A going out into the market and persuading the sole supplier of such goods, B, to sell all the goods to him (A) in order that X should be unable to fulfil his contract with Y. That strikes every reasonable man, and therefore the judiciary, as obvious common sense. It is just trade rivalry in a competitive society.[31] So long as A uses no unlawful means he is safe. But what is sauce for the commercial goose should also be sauce for the industrial gander. If all " indirect influence " (however lawful in itself) which caused a contract to be broken were to become tortious, the flood of liability would engulf not only trade union officials but also the most innocent competitive profit-seeking trader.

The T.U.C. has demanded of the Donovan Royal Commission that section 8 of the Trade Disputes Act 1906 be amended so as to provide protection in trade disputes against the ever-growing tort of procuring breach of *commercial* contracts. As is well known, at present neither the Act of 1906 nor the 1965 Act extends to commercial contracts. By the time this note is published the Donovan

[30] See Lord Pearce, *Stratford* v. *Lindley* [1965] A.C. at pp. 888 and 885, passages which were misinterpreted in *Square Grip Reinforcement* v. *Macdonald*, 1968 S.L.T. 65 (see next issue). Lord Pearce expressly inclined to agree with *Thomson* v. *Deakin*, where facts disclosed only an indirect inducement.

[31] See Lord Wright in *Crofter Handwoven Harris Tweed* v. *Veitch* [1942] A.C. 435 at p. 472.

Report will be in print. It would be unfortunate and ironic if, as that print was drying on the pages, the judges began to manipulate yet again doctrines which underlie the whole discussion of industrial law. Even after the *Stratford* case, trade union officials acted at their peril.[22] If as may be suggested by Lord Denning M.R. (and as was effected in the *Square Grip* case) they are to be deprived now of the slender protection afforded by the technical doctrines applicable to "indirect" inducement of breach of commercial contract, established in *Thomson* v. *Deakin*, it will become dangerous for them even to inform their membership of official disputes and the "blacking" of a firm. Ordinary trade union activity would once again be put in jeopardy by judicial development of the common law. Perhaps a more persuasive argument for some observers will be the fact that ordinary trade competition will also encounter new dangers.

K. W. Wedderburn

Administrative Law—A Step Forward?

The decision of the House of Lords in *Padfield* v. *Minister of Agriculture, Fisheries and Food* [1] is perhaps the most important forward step taken by the courts of this country in the field of administrative law since *Ridge* v. *Baldwin* [2] and in some respects it may prove to be even more important than that major stride towards a coherent system of administrative procedure. Whereas *Ridge* v. *Baldwin* was concerned only with proper procedures—after all it was never suggested that the Brighton Watch Committee were not entitled to decide to dispense with the services of their Chief Constable, provided they went about their decision process in the right way—*Padfield* was concerned with the extent of the substantive powers conferred on the executive by statute.

It has been clear for some time that the outstanding principle of our administrative law is the *ultra vires* doctrine; Parliament is omnipotent, and the creatures of Parliament derive all their power from Parliament. Therefore, if Parliament has not empowered a Minister, a Board or a local authority (other possibly than an ancient chartered corporation) to act in a certain matter, that Minister or other agency is powerless. Indeed error of law on the face of the record,[3] excess of jurisdiction,[4] wrong motive [5] and

[22] See the note in (1965) 28 M.L.R. 205.

[1] [1968] 1 All E.R. 694.

[2] [1963] 3 All E.R. 66. Not even excepting *Conway* v. *Rimmer* [1968] 1 All E.R. 874, as that Crown privilege case was concerned with a much narrower issue than those raised in *Padfield*.

[3] See, *e.g.*, *R.* v. *Northumberland Compensation Appeal Tribunal, ex p. Shaw* [1952] 1 All E.R. 122.

[4] As in *Anisminic Ltd.* v. *Foreign Compensation Commission* [1967] 2 All E.R. 986.

[5] In so far as this is recognised at all in the English courts, it will be a ground for quashing an executive decision only if a motive or purpose is specified in

other possible categories of circumstances justifying the court's supervision of executive action, can all be discussed in the form of a commentary on the *ultra vires* doctrine.

Normally, however, the limits of an administrative discretion are specified or implied in the terms of a statute; thus, conditions imposed under a planning statute cannot be used to create a system of rent control [6] and a power to legislate for the raising of revenue could not be made to hide the introduction of a novel system of economic and political management.[7] On occasion, however, the courts have been prepared to hold that a wide statutory discretion entrusted to an executive agency must be exercised reasonably [8] and the objective test of whether " any reasonable Minister " would have so decided, may be applied to assess whether the particular decision was within the powers of the enabling statute.[9] In order to take this line, however, the court must often come near to " glossing " the statute, and to read into the discretion qualifications that are not actually there.

Rarely has the court been prepared to take such a course without some words being present in the statute to assist it. However, in *Padfield's* case the glossing process was applied generously. The essential facts of the case were as follows.

Under the Agricultural Marketing Act 1958, the Milk Marketing Board had made a scheme for payments to producers of milk, under which producers in regions of the country nearest to the farms were paid less than producers further away from the farms but closer to large concentrations of consumers (the south-east in particular). The south-eastern producers requested the Board to reconsider the

the enabling legislation: see *Westminster Corporation* v. *London and North Western Railway* [1905] A.C. 426, and *Hanks* v. *Minister of Housing and Local Government* [1963] 1 All E.R. 47.

[6] *Chertsey U.D.C.* v. *Mixnam's Properties Ltd.* [1964] 2 All E.R. 627.

[7] *i.e.*, Social Credit; see *Att.-Gen. for Alberta* v. *Att.-Gen. for Canada* [1939] 1 All E.R. 423.

[8] The classic example of this approach is, of course, *Roberts* v. *Hopwood* [1925] A.C. 578; see also *Taylor* v. *Munrow* [1960] 1 All E.R. 455.

[9] See, for example, *Ross-Clunis* v. *Papadopoullos* [1958] 2 All E.R. 23. The reasoning in these cases gets near to the French doctrine of *détournement de pouvoir*, where a decision of an administrative agency will be quashed by the court if the *but* or objective sought to be attained by the decision is not precisely within the *motif*, or purpose of the legislator. The French administrative courts will go even further, and where no *motif* can be spelt out from the statute itself, they will infer one from the circumstances, as in *Tabouret et Lerooke* (C.E., July 9, 1948): see Brown and Garner's *French Administrative Law*, at p. 123. From another approach, the French courts are normally prepared to qualify the facts of a situation in the light of the terms of the enabling statute, and if the reasons given for the administrator's decision do not fit the facts or the terms of the statute, the decision will be quashed as a *violation de la loi*.

The reasoning in *Padfield* is, as will be seen, even closer to the French methods of approach. Whereas it is unlikely that we shall ever see a *Conseil d'Etat* on the French model on this side of the Channel, it seems that our law is at last stepping very cautiously, and with many a backward glance (see *e.g.*, *Durayappah* v. *Fernando* [1967] 2 All E.R. 152), towards a logical system of substantive administrative law as is to be seen in the French *droit administratif*.

scheme because, they alleged, the differential in their favour between the several regions was not big enough. The Board, consisting of representatives from all the regions, refused to do anything; the south-eastern producers were in a minority on the Board and it would have been against the financial interests of the producers from the other regions to have made the suggested alterations in the scheme. The south-eastern producers (the appellants) then complained to the Minister and asked him to direct that their complaint should be referred to the "committee of investigation" established under section 19 of the Act of 1958. This section provides that this committee shall be charged with the duty "if the Minister in any case so directs" of considering and reporting on, *inter alia*, any complaint made to the Minister. The Minister claimed that these words gave him a wide unfettered discretion, his only duty being to consider a complaint fairly, and he refused to refer the complaint to the committee. His reasons were that the complaint would "involve the regional price structure as a whole," and that it therefore raised issues too wide to be considered by the committee of investigation. The appellants thereupon sought an order of mandamus against the Minister directing him to refer their complaint to the committee. The appellants were successful before a Queen's Bench Divisional Court, lost on appeal to the Court of Appeal,[10] but were successful again in the House of Lords.

Their Lordships expressed the opinion that the Minister must exercise his jurisdiction in accordance with the general policy of the Act, although the phraseology of section 19 does not impose any express limitation on that discretion. Thus, Lord Reid said (at p. 699), "Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act: the policy and objects of the Act must be determined by construing the Act as a whole, and construction is always a matter of law for the court." Lord Hodson, while pointing out that the complaint was not frivolous or vexatious, said (at p. 712) that "[the Minister] as the guardian of the public interest has a duty to protect the interests of those who claim to have been treated contrary to the public interest," while Lord Pearce said (at p. 715) that "Parliament intended that certain substantial complaints (involving the public interest) under the compulsory scheme should be considered by the investigation committee. It was for the Minister to use his discretion to promote Parliament's intention." Lord Upjohn's judgment is much to the same effect, while Lord Morris of Borth-y-Gest dissented from the opinions of the other members of the House that mandamus should lie against the Minister on the ground that the Minister's discretion was "unfettered."

10 The decisions at first instance and in the Court of Appeal do not seem to have been reported.

Therefore the decision of the majority may, it seems, be summarised as amounting to a finding that the apparent wide discretion of the Minister was limited by the " general purpose " of the Act, to a power to assure himself that a complaint was neither frivolous nor vexatious and that it was in the public interest that it should be considered. If he was so satisfied, it then became his duty to refer the complaint to the committee; they would investigate and report (publicly) on the complaint and it would then become the Minister's duty, as a matter of policy, to decide what (if anything) was to be done. Only if the complaint did not stand up to this test would the Minister be entitled to refuse to refer it to the committee.

If this decision is followed generally, it will begin to make sense of our administrative law. Not only will the courts be able to insist on proper administrative procedures, but they will also be able to ensure that the executive are loyally implementing the general intentions of Parliament, as may be deduced (or inferred(?)) from the statute, and in exercising such a supervision they may no longer be confined to a precise examination of the exact words used in the statute. It is not far from this reasoning to formulate general principles qualifying administrative discretions, which must be observed in the absence of express exclusionary words in the statute. This may be the next step.

Two incidental questions of interest also are raised by the decision. The first is the question, never clearly answered, whether mandamus will be granted against a Minister. This has always been true in so far as the statute has imposed a duty on the Minister as such,[11] and it was in this capacity that mandamus was granted in the present case; in what circumstances mandamus will be granted against a Minister as adviser to the Crown remains, it seems, open.[12] Secondly, it was argued in the present case that as the Minister was not bound to give his reasons for refusing to refer the complaint to the committee, " it would be very unfortunate if giving reasons were to put him in a worse position " (see judgment of Lord Reid, at p. 701). This argument was, however, brushed aside; it did not follow in their Lordships' view, that a decision could not be questioned if no reasons were given; if the Minister gives no reason whatever for taking a certain course, " the court may infer he has no good reasons and that he is not using the power given by Parliament to carry out its intentions " (*per* Lord Pearce, at p. 714).[13]

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[11] See de Smith, *Judicial Review of Administrative Action*, p. 445.
[12] *Ibid.* and see *R.* v. *I.R.C., Re Nathan* (1884) 12 Q.B.D. 461.
[13] Again an argument reminiscent of the French approach, in such decisions as *Barel*, C.E., May 28, 1954.

LABOUR-ONLY AGAIN

SOME of the problems considered in an earlier article [1] on the labour-only contract are now coming home to roost. In *Ready Mixed Concrete (South East) Ltd.* v. *Minister of Pensions and National Insurance* [2] MacKenna J. had to classify a long and ingeniously drawn contract between the appellants ("the company") and one Latimer, who was engaged in driving a truck with a rotating drum affixed, for the purposes of delivering the appellants' concrete to their customers. The point immediately at issue was whether the appellants were liable, in a particular week in 1965, to pay National Insurance contributions for Mr. Latimer as a class 1 contributor in accordance with sections 1 (2) and 8 of the National Insurance Act 1965. For this it was necessary to determine whether the contract in question was a contract of service or of some other kind.

On this, at any rate, the contract itself was unequivocal. By clause 80 "The owner-driver [i.e., Mr. Latimer] is hereby declared to be an independent contractor." The learned judge rightly, it is submitted, held that this was without importance.

> "Whether the relation between the parties to the contract is that of master and servant or otherwise is a conclusion of law dependent upon the rights conferred and the duties imposed by the contract. If these are such that the relation is that of master and servant, it is irrelevant that the parties have declared it to be something else. I do not say that a declaration of this kind is always necessarily ineffective. It it were doubtful what rights and duties the parties wished to provide for, a declaration of this kind might help in resolving the doubt and fixing them in the sense required to give effect to that intention."

Nor was the intention of the parties in itself conclusive. "If the rights conferred and the duties imposed by the contract are such that the relation is that of master and servant, it is irrelevant that the parties who made the contract would have preferred a different conclusion."

The answer must be sought then in the terms of the contract. The traditional test, formulated by McCardie J. in *Performing Right Society Ltd.* v. *Mitchel & Booker Ltd.*,[3] turning essentially on the alleged employer's right to control the manner in which the work was done, has long been felt to be unsatisfactory. MacKenna J. does not mention this test at all until the very end of his judgment and many of the familiar cases, though cited to him in argument, are not referred to at all. Nor does Lord Denning's alternative test —that of the integration of the workman into the employer's organisation—fare any better. It is dismissed with the observation that "this raises more questions than I know how to answer." [4]

[1] "Industrial Law and the Labour-Only Subcontract" (1967) 30 M.L.R. 6.
[2] [1968] 1 All E.R. 433; a better report setting out the details of the contract in the case in full is in [1968] 2 W.L.R. 775. See also, pp. 412 ff. above.
[3] [1924] 1 K.B. 762.
[4] [1968] 1 All E.R. at p. 445.

The control test, however, reappears in a new—indeed, a startlingly new—form. According to the present judgment, while it is a *necessary* condition for a contract of service to exist that the servant is to be subject to the control of the other party in a sufficient degree to make that other master, it is not a *sufficient* condition; and the contract will not be a contract of service unless " the other provisions of the contract are consistent with its being a contract of service." In the present case this led to the surprising result that a contract, extending over twenty-two pages of foolscap, prescribing in the minutest detail what Mr. Latimer was to do and including an express provision that he was to " carry out all reasonable orders from any competent servant of the Company as if he were an employee of the Company," was held to be a contract of carriage.

Since there was no warrant in the English authorities for applying the test in this way, recourse was had to a great variety of Australian, Canadian and United States cases. There is no space to examine these here. In the only one which reached the Privy Council, Lord Wright had propounded a four-fold test, " a complex involving (1) control; (2) ownership of the tools; (3) chance of profit; (4) risk of loss. . . . In many cases the question can only be settled by examining the whole of the various elements which constitute the relationship between the parties. In this way it is in some cases possible to decide the issue by raising as the crucial question whose business is it." [5]

Most of the terms of the present contract are adequately summarised in the judgment. They included a provision that Mr. Latimer should buy the truck (though not the rotating drum and its motor, which remained the property of the company) over a period of four years from a hire-purchase company, Readymix Finance Ltd. For a period of five years he was to make it available to the company at all times of the day or night and could be required to drive it up to the maximum number of hours permitted under the Road Traffic Act " unless he shall have a reason for not doing so which would have been valid had he been the employed driver of the Company." At such times, and during such holiday times (not exceeding two weeks a year) as the company might agree, he could provide, with their consent, a suitably qualified driver to operate the truck in his place.[6] The company could appoint a substitute driver if Mr. Latimer failed to do so. He was to wear a uniform of the pattern and colour prescribed by the company (at his own expense); comply with all rules, regulations or requirements of the company; and keep the truck in good repair at his

[5] *Montreal Locomotive Works* v. *Montreal and Att.-Gen. for Canada* [1947] 1 D.L.R. 161, cited in Atiyah, *Vicarious Liability in the Law of Torts*, 38–39.

[6] Some power to delegate the work, or to provide a substitute, is not—though it is often thought to be—inconsistent with a contract of service. See Atiyah, *op. cit.*, 59–60.

own expense, and freshly painted and signwritten as the company directed. The company were to insure it on his behalf and charge him with the premiums. Moneys received under the policy were to be used to reinstate the vehicle; or, at their option, Mr. Latimer was to assign all his rights under the policy to the company forthwith and the policy moneys were to be paid to them.

Some of the terms—for example, those relating to summary dismissal—were more stringent than would normally be found in a contract of service. Incidentally, the agreement was expressed to be personal to Mr. Latimer, who was not entitled to assign the benefit of it; but there was no corresponding provision to prevent the company from doing so if it wished.[7]

In the event the learned judge appeared to rest his judgment mainly on three considerations. One of them was the amount of Mr. Latimer's profits.[8] These were just over £4,000 gross for each of the first two years of the agreement. After meeting all his various expenses the net amounts were £3,827 and £2,004 respectively. This was compared with the wage of £25 per week paid to a relief driver and slightly less to other drivers who were admittedly the company's servants. This by itself, however, could surely not be decisive. Again, it was said that Mr. Latimer took the chance of profit and the risk of loss—in a word that he was really "a small businessman."[9] So far as it went this was true; but there was a provision in the contract for a minimum remuneration of £1,500 a year on the basis of 280 days on which the truck should be available to the company (reduced *pro rata* if it was available for fewer days in any one year). In substance, the difference between this arrangement and a salary of £1,500 a year plus bonus measured by output might not be very great. From one point of view the whole arrangement was merely an elaborate incentive scheme. Indeed, the company themselves asserted that the owner-driver scheme was introduced in the belief that it would stimulate "speedy and efficient cartage, the maintenance of the trucks in good condition and the careful driving thereof, and would benefit the owner-driver by giving him an incentive to work for a higher return without abusing the vehicle in the way which often happened if an employee was given a bonus scheme related to the use of his employer's vehicle."

The judge also laid considerable weight on the fact that the ownership of the truck had passed to Mr. Latimer—following here the comment on section 220 (2) of the *American Restatement*,

[7] Compare the principle in *Nokes* v. *Doncaster Amalgamated Collieries Ltd.* [1940] A.C. 1014.

[8] He was paid at given rates per mile and per cubic yard carried.

[9] *Cf. U.S.* v. *Silk*, 331 U.S. 704 (1946). Some of the other drivers for Ready Mixed were said to have an interest in several trucks: a fact which appears in the case stated, and in the report, but not in the judgment. Again, this could surely not affect the construction of Mr. Latimer's contract, who had only one.

Agency (*2nd*), dealing with what it elegantly calls the " ownership of instrumentalities." No doubt in this country the fact that a workman provides his own tools is of little significance; in many trades he does so as a matter of custom and is nonetheless a servant for that. If the employer owns substantial items of machinery and plant, again, as a rule, the man who operates them is a servant. If he provides them himself it is certainly some indication that he is not a servant but an independent contractor; and this was formally the case here. If the reality of the transaction is looked at Mr. Latimer did not " provide " the truck at all. He was only the owner of it in a very limited and circumscribed sense. For four years he would not be the owner at all but a hirer. Yet by clause 32 (to which the judgment makes no reference) on the determination of the agreement at any time and for whatever reason the company had an option to purchase the vehicle from him at market price, exercisable by serving a notice on him " and upon the service of such notice the property in the vehicle (whether or not it is subject to any charge) shall pass to the Company." No doubt " hirer-driver " would have sounded a good deal less " independent."

Despite MacKenna J.'s welcome enunciation of the principle that the court is bound to look behind the declarations and subjective intentions of the parties to the reality of the contract one cannot escape an uneasy feeling that in this case the form in which the arrangement was cast has been allowed to prevail over the substance. It is the more unfortunate that a decision dealing in a radically new way with one of the fundamental problems of labour law should have been given under section 65 of the National Insurance Act 1965, which precludes the possibility of the case being taken any further on appeal.

G. DE N. CLARK

SUING TWICE ON THE SAME ACCIDENT

The rule in Brunsden v. *Humphrey* [1]

THE plaintiff was involved in a car accident. He sued the defendant for damages in respect of the damage to the car. Subsequently, at a time when he would have been out of time if he had issued a second writ, the plaintiff sought leave to amend his statement of claim so as to include a claim for damages in respect of personal injuries. If there was only one cause of action the plaintiff would be able to amend his pleadings so as to include a second head of damages, whereas if that second head of damages constituted a second cause of action it would be necessary to issue a second writ,

[1] (1884) 14 Q.B.D. 141; [1881–1885] All E.R.Rep. 357. See also *Conquer* v. *Boot* [1928] 2 K.B. 336, 340. *Derrick* v. *Williams* [1939] 2 All E.R. 559, 566. *The Oropesa* [1943] P. 32, 35. *Greenhalgh* v. *Mallard* [1947] 2 All E.R. 255, 258C. *Winter* v. *Dewar* (1929) 4 D.L.R. 389. *Sandberg* v. *Giesbrecht* (1968) 42 D.L.R. 107.

which would be out of time.[2] Was there one cause of action or were there two? This was the problem in *Cahoon* v. *Franks*.[3]

Will the defendant be able to plead *res judicata* in any of the following situations? (1) The plaintiff sued for damage to his car. He subsequently sued for personal injuries. (2) The plaintiff sued for personal injuries. He subsequently sued for damage to his car. (3) The plaintiff sued for injury to his leg. He subsequently sued for injury to his hand. (4) The plaintiff sued for injury to his leg. He subsequently sued for an aggravated injury to the same leg which developed after the first action. (5) The plaintiff sued for damage to his car. He subsequently sued for damage to his clothes. (6) The plaintiff negotiated with the defendant's insurers who agreed, or had nearly reached the point of agreeing, to pay the damages except for the first £20, as provided for under the relevant policy. The plaintiff accordingly sued and obtained judgment for £20 against the defendant. The defendant's insurers became insolvent before making any payment, and the plaintiff subsequently sued the defendant for the outstanding amount.

The general principle is usually said to be that a subsequent action will not lie upon the same cause of action as that relied upon in the first action. A cause of action is a phrase not very clearly understood in the law. It might mean: (1) two different torts are relied upon, *e.g.*, negligence and trespass; (2) two different rights in the plaintiff have been infringed; (3) the type of injury or damage suffered was different; (4) the evidence necessary to establish the case would be different in each case; (5) the factual situation to be established was different in each case.

The traditional approach of English law appears to be that two actions will not lie for personal injuries but they will lie for personal injuries and damage to property: *Brunsden* v. *Humphrey*. This approach is open to doubt, and has been decisively rejected in U.S.A. and Canada. As Porter J.A. said in *Cahoon* [4]: "The factual situation which gave the plaintiff a cause of action was the negligence of the defendant which caused the plaintiff to suffer damage. This single cause of action cannot be split to be made the subject of several causes of action." Even the "two torts" approach in England is of doubtful utility because the courts have said that where the essence of the plaintiff's case is negligence, *e.g.*, in a motor-car or similar accident, trespass will not lie: *Letang* v. *Cooper*,[5] Diplock L.J.[6] speaking of the single factual situation.

The justifications for the traditional view run along the following lines. The court has an inherent power to prevent any abuse by way of vexatious litigation. The court can refuse to award

[2] *Weldon* v. *Neal* (1887) 19 Q.B.D. 394.
[3] (1967) 63 D.L.R. (2d) 274, Supreme Court of Canada, affirming (1967) 60 D.L.R. (2d) 237.
[4] (1967) 60 D.L.R. (2d) 237, 240, approved in the Supreme Court of Canada.
[5] [1965] 1 Q.B. 232 (C.A.); Dworkin (1965) 28 M.L.R. 92.
[6] At p. 244B.

costs in the second action. Two distinct torts can hardly be described as a single cause of action. Periods of limitation may be different for the two torts, *e.g.*, negligence for personal injuries and trespass to land or goods. Problems of causation and remoteness may arise in one action and not the other, and the evidence necessary to establish the injury or damage may be quite different in each. There may be issues of identity or justification in one action, *e.g.*, the personal injury action, which are totally irrelevant in the other, *e.g.*, damage to property; or there may be issues of title in the property action which are totally irrelevant in the other. A defendant is never liable for negligence *per se*, but only if and as and when damage is caused. Damage to the property may be immediately apparent, injury to the person not so immediately apparent; or vice versa. It would be harsh to penalise the plaintiff because he not unreasonably proceeded to judgment on the known and provable consequences of the negligence by prohibiting him from recovering damages for consequences subsequently appearing, within the appropriate period of limitation.

The arguments in favour of the factual situation approach are, it is submitted, compelling. There was a single act, event or occasion at which all the injury and damage occurred. Litigation should be completed as soon as possible, consistent with justice. The defendant must be protected against repetitious claims. The time of the courts and of everyone else involved in litigation is not to be wasted by unnecessary repetition. The different types of injury and damage suffered go to damages and not to liability. There is an essential distinction between a cause of action and a head of damages. Technicalities about the descriptions of torts relied upon are not to be encouraged. There are no distinct rights, not to be personally injured and not to have property damaged, but a single right not to be damnified by the negligence of the defendant. There is no logic in distinguishing between property damage and personal injury but not between different aspects of the interest in personal security. It would be illogical to refuse a second action for another personal injury but to allow a second action for damage to clothes after a first action of personal injury. No hardship to the plaintiff need arise because a prudent solicitor should as a matter of course include in his single claim all the various heads of damage arising.

It is submitted that in logic and on principle the better view is that two actions ought not to lie in respect of injuries and damage arising out of a single factual situation, a single accident, and that it is open to the English courts to take this view, and increasingly likely that they will do so when the occasion next arises.

ALEC SAMUELS.

Trade Unions, Advice and Limitation

In two recent cases [1] the courts have had to consider claims by members of the trade unions against their unions in respect of legal advice. In both cases the plaintiffs had been injured at work and had submitted their claims to their respective unions.

In *Buckley* v. *N.U.G.M.W.* the plaintiff slipped on a floor which was wet as a result of being cleaned. She contacted the second defendant, Yates, the union branch secretary, who helped her to fill in the union's accident form. One question asked whether the accident was caused by the negligence of the employer. The plaintiff, relying on advice given by Yates, replied that it was " a pure accident " and the form was forwarded to the union's compensation officer stating " No negligence." The compensation officer replied to Yates pointing out the need to apply for industrial injury benefit, but did not mention the claim for damages, which appeared to have been forgotten, until the plaintiff, some fifteen months later, again raised it with Yates. After a letter from Yates, the compensation officer wrote that on the facts in the form he could not see a claim for negligence and asked for further information, which was provided. Again he advised that there was no claim. No further action was taken in the matter and the limitation period expired.

In *Cross* v. *B.I.S.K.T.A.* the plaintiff's hand was damaged in an accident. He too contacted his branch secretary, Morley, and told him his story. Morley filled in the necessary forms and forwarded them to the union's headquarters, from where they were passed on to a firm of solicitors who were experienced in the matters connected with the industry. The solicitor, on the basis of the forms, wrote to the branch secretary that he could not see any basis for a claim at common law, and this advice was passed on to the plaintiff. In spite of the matter being raised by Cross on several occasions, the matter was left there without further investigation and, again, the limitation period expired without a writ being issued.

Both plaintiffs claimed against their respective unions for breach of contract in failing to provide correct legal advice and in not informing the plaintiffs of the relevant limitation period in sufficient time for them to obtain legal advice elsewhere.

Since *Bonsor's* case [2] it is clear that a member has a contract with his union and can sue in respect of breaches subject to any difficulties connected with the rule in *Foss* v. *Harbottle*.[3] However, the jurisprudential basis of the contract appears to be somewhat unsatisfactory. As a trade union has rights and duties independent

[1] *Buckley* v. *National Union of General and Municipal Workers* [1967] 3 All E.R. 767 and *Cross* v. *British Iron Steel and Kindred Trades Association* [1968] 1 All E.R. 250 (C.A.).
[2] *Bonsor* v. *Musicians' Union* [1956] A.C. 104; [1955] 3 All E.R. 578 (H.L.).
[3] (1843) 2 Hare 461; see, *e.g.*, *Edwards* v. *Halliwell* [1950] 2 All E.R. 1064 (C.A.).

of those of its members, individually and collectively, it is not an ordinary unincorporated association. But as it is not incorporated under the Companies Acts 1948–67,[4] it cannot be a full legal person like a registered company. Many recent considerations of the subject have, therefore, christened it a quasi—a near person.[5]

This approach appears to be based on the fallacious assumption that legal personality necessarily involves having a certain minimum number of rights and duties, and any legal entity not having all of those basic rights cannot be a full legal person. However, this is not so, and physical persons having less than the ordinary set of rights and duties, *e.g.*, infants and mental patients, are nevertheless treated as legal entities without any very great difficulty. So if a group of persons or a fund has independent rights and duties there is no reason why it should be treated differently from other legal entities simply because it does not have exactly the same rights and duties. If the group has such a right or duty, it should be entitled to litigate in respect of it just as any " ordinary " legal entity.[6] However, it is hoped that this problem will be solved by a simple recommendation of the Royal Commission that trade unions should be incorporated, thus overcoming the chaos of registered and unregistered unions.

On the question whether the union had carried out its contractual obligations, in *Cross*'s case the Court of Appeal stated that by referring the matter to an experienced solicitor the union had discharged its duties. The obligation under the rules was " to obtain for the member legal advice from a person of reasonable skill and experience " [7] but the union did not warrant that the solicitor or barrister concerned shall perform his duties carefully and skilfully: still less that the legal advice given is right." [8] That is to say, it was sufficient to refer the matter to a legally qualified person who was reasonably believed to be competent, and there was no duty on the union to check the accuracy of the advice nor that the adviser had understood the facts, nor that all the material facts had been brought to his attention.

There seems, however, to be a conflict within the judgments. The union does not guarantee that the advice so obtained is correct, but it must believe that the lawyer is reasonably skilful and competent. If this belief must be based upon reasonable grounds, a union may be liable if it refers a case to a solicitor without first investigating whether he appears to be competent, and he gives advice negligently. That is, the union does not promise accuracy, but it may be liable if the advice is incorrect—a strange result

[4] Companies Act 1948, s. 459 (9) (*b*); see Hickling, " Trade Unions in Disguise " (1964) 27 M.L.R. 625.
[5] *Knight and Searle* v. *Dove* [1964] 2 Q.B. 631; see Wedderburn, " Corporate Personality and Social Policy " (1965) 28 M.L.R. 62.
[6] See Nekam, *Personality Conception of the Legal Entity* (Harvard).
[7] [1968] 1 All E.R. at p. 255, *per* Diplock L.J.
[8] *Ibid.*, *per* Salmon L.J.

which depended upon the construction of the relevant union rules.

On the other hand, in *Buckley's* case the matter was handled entirely by officials of the union itself. Acting solely on the information provided in the form filled in by the plaintiff, the compensation officer advised that there was no claim that could be made. Nield J. held that this was sufficient to discharge the duty; there was no need to refer the matter to a solicitor or barrister.

This seems to be somewhat unsatisfactory. The plaintiff in this case did not understand the legal niceties involved in the law of negligence and the employer's duty of care to employees, and may have omitted to provide relevant information, although helped by an experienced union official. While accepting that trade unions are not sufficiently wealthy to refer every complaint to solicitors for advice, it seems harsh that many potentially successful plaintiffs may be ill-advised by laymen, albeit very experienced in these matters. The standard of care expected from a layman may, in practice, be lower than that expected from a solicitor, although in *Cross's* case the court did not commit itself on the point whether the plaintiff would have a claim against the solicitor had the advice been negligent. Surely it is not expecting too much of union officials to advise their injured members of the existence of the legal aid and advice scheme to enable them to obtain professional assistance. Furthermore, there was no duty to advise the plaintiffs as to the running of the period under the Limitation Acts 1939–63, so that they might attempt to obtain such outside advice speedily before it was too late. Not a very satisfactory solution to the problem.

Although it was found the unions were not liable, the courts went on to consider what would have happened had negligence been established. In order to succeed the plaintiff had to show that the initial action would have been decided in his favour had it not been statute-barred. The policy of the Limitation Acts was stated recently by Lord Denning M.R.[9] to be to prevent stale claims—after a period of time has elapsed from the events it becomes impossible to conduct a fair trial because of loss of evidence, and dulling of witnesses' memories. Yet in these cases the court was trying to do what it said could not be done—it was attempting to give a fair trial of a case that the law said could not be fairly tried because of the lapse of time. The unreality of this trial within a trial is increased when the position of the defendant is considered. He has to defend an action which should have been brought against another party without necessarily having the evidence in defence that the other party proposed to call. Also the plaintiff is prejudiced by the fact that the defendant as his former adviser is in a position to know more of the weaknesses in the plaintiff's initial case than the original defendant would have done.

[9] *Fitzpatrick* v. *Batger* [1967] 2 All E.R. 657.

This cannot be said to be a reasonable answer. The unreality of this trial clearly prevents a fair result. Furthermore, the assessment of damages also adds to the oddity of the position. The plaintiff receives only those damages he would have recovered had the original claim been successfully litigated. The question of the plaintiff's receiving compensation for the loss of the nuisance value of his claim was rejected in *Kitchen* v. *R.A.F.A.*[10] This clearly ignores the realities of the situation. Many unmeritorious claimants are bought off by *ex gratia* payments. The solicitor and own client costs of even a successful action are usually far in excess of the sum required to satisfy such a plaintiff. Many insurance companies prefer to pay rather than fight and find it cheaper. To ignore the possibility of this is to take a narrow and legalistic view of modern procedure and practice.

R. S. NOCK.

RUNNING OF RESTRICTIVE COVENANTS

THE part-proprietary, part-contractual, nature of the obligation imposed on land by a restrictive covenant makes possible a crop of mixed issues, whenever a successor to the covenantee seeks to enforce the covenant against a successor to the covenantor. Logically, these may be divided into three stages:

Stage 1: Was this covenant from its inception such that it could rank as a proprietary obligation burdening freehold land? Four requirements have to be satisfied: (*a*) The covenant must have been in substance negative [1]; (*b*) the instrument imposing it must contain nothing to exclude the intention that the covenant was intended to bind successors to the covenantor, which is implied by section 79 of the Law of Property Act 1925 [2]; (*c*) the covenant must relate to ascertained land [3] of the covenantee [4]; and (*d*) such land must have been capable of benefiting by the covenant.[5] Of these, the second and third issues are matters of construction, and therefore initially within the control of the parties, whilst the first and fourth are heteronomic requirements of the law of property.[6]

Stage 2: Is this particular defendant bound by the covenant?

[10] [1958] 1 W.L.R. 563 (C.A.), *per* Lord Evershed M.R. at p. 575.

[1] *L.S.W. Ry.* v. *Gomm* (1882) 20 Ch.D. 562; *Austerberry* v. *Oldham Corporation* (1885) 29 Ch.D. 750.

[2] The exclusion of the statutory implication need not be explicit, provided it can be gathered from the terms of the deed imposing the covenant—*Re Royal Victoria Pavilion (Ramsgate)* [1961] Ch. 581.

[3] A description such as "neighbourhood" would usually be too indefinite—*Marquess of Zetland* v. *Driver* [1939] Ch. 1 at p. 9.

[4] *Formby* v. *Barker* [1903] 2 Ch. 539; *L.C.C.* v. *Allen* [1914] 3 K.B. 642. It will then be deemed to be made with the covenantee and his successors in title, by virtue of s. 78 of the Law of Property Act 1925, irrespective of contrary intention.

[5] *Re Ballard's Conveyance* [1937] Ch. 473.

[6] The decision in *Newton Abbot Co-operative Society Ltd.* v. *Williamson and Treadgold Ltd.* [1952] Ch. 286 means that, once the fourth requirement is found, the third may easily be implied.

This turns on notice, if the covenant was entered into before 1926,[7] otherwise on registration as a land charge.[8]

Stage 8: Has the benefit of the covenant passed to this particular plaintiff? If he is neither the original covenantee,[9] nor his representative,[10] the benefit will only pass to him if he has succeeded to land of the covenantee which is still capable of benefiting from the covenant [11] and, (*a*) the benefit of the covenant was expressly assigned to him with the land [12]; or (*b*) the benefit of the covenant was expressly annexed to the land to which the plaintiff has succeeded [13]; or (*c*) he has succeeded to a plot which was part of a scheme of development.[14]

The issue of construction in 8 (*b*) above has been a peculiar source of difficulty wherever the plaintiff has succeeded to only part of the land of the original covenantee; for then it has to be shown that the benefit of the covenant was expressely annexed to this particular part. The traditional formula for achieving such annexation is: "to each and every part" of the land of the covenantee.[15] Two other guides to construction were considered by Goff J. in *Re Selwyn's Conveyance*.[16]

There, a covenant entered into by the purchaser of a house was expressed to "enure for the protection of the adjoining or neighbouring land part of or lately part of the Selwyn Estate." One of the issues before the court [17] was whether these words successfully annexed the benefit of the covenant to each part of the covenantee's land, so as to pass, without express assignment, on conveyances of parts of the land.

A dichotomy invented by Romer L.J. in *Drake* v. *Gray* [18] was cited: ". . . where, as here, you find not 'the land coloured yellow' or 'the estate' or 'the field named so and so' or anything of that kind, but 'the lands retained by the vendor,' it

[7] *Re Nisbet and Potts' Contract* [1905] 1 Ch. 391.
[8] Land Charges Act 1925, s. 10 (1), s. 13 (2).
[9] Including persons with whom the covenant was made although they were not parties to the deed creating the covenant, Law of Property Act 1925, s. 56 (1).
[10] *Newton Abbot Co-operative Society Ltd.* v. *Williamson and Treadgold Ltd.*, *supra*; *Marten* v. *Flight Refuelling Ltd.* [1962] Ch. 115.
[11] *Chatsworth Estates Co.* v. *Fewell* [1931] 1 Ch. 224. The covenant may be ripe for discharge or modification under the provisions of s. 84 of the Law of Property Act 1925.
[12] *Renals* v. *Cowlishaw* (1878) 9 Ch.D. 125, *per* Hall V.-C. at p. 130; *Rogers* v. *Hosegood* [1900] 2 Ch. 388, *per* Collins L.J. at p. 407; *Newton Abbot Co-operative Society Ltd.* v. *Williamson and Treadgold Ltd.*, *supra*; *Stilwell* v. *Blackman* [1967] 3 All E.R. 514.
[13] *Rogers* v. *Hosegood*, *supra*. It is still a disputed question whether the first assignment of the benefit of a restrictive covenant brings about automatic annexation. Recent cases suggest that it does not—*Re Pinewood Estates, Farnborough* [1958] Ch. 280; *Stilwell* v. *Blackman*, *supra*.
[14] *Elliston* v. *Reacher* [1908] 2 Ch. 374; *Baxter* v. *Four Oaks Properties Ltd.* [1965] Ch. 816.
[15] Preston and Newsom, *Restrictive Covenants Affecting Freehold Land* (4th ed.), p. 18.
[16] [1967] 1 All E.R. 899.
[17] It was also held that the description of the covenantee's land was sufficient to make it ascertainable.
[18] [1936] Ch. 451 at p. 465.

appears to me that there is a sufficient indication that the benefit of the covenant enures to every one of the lands retained by the vendor. . . ." Goff J. agreed with Buckley J. in *Russell* v. *Archdale* [19] and Stamp J. in *Re Jeffs' Transfer*,[20] in rejecting this distinction as a general guide to construction.[21]

However, he accepted another ground for construing the words of annexation as effective in respect of every part of the covenantee's land. The benefit was expressed to enure to land " lately part of the Selwyn Estate." This description covered land already sold by the vendor, and so annexed the benefit to land in different ownerships, rather than to the whole estate as a unity. Accordingly, whether or not the attempt to benefit land already sold was effective, the intention to annex the benefit to each and every part was manifested.[22]

An additional refinement of the rules relating to passing of benefit was rejected by Ungoed-Thomas J. in *Stilwell* v. *Blackman*,[23] when he held that express annexation of the benefit of a restrictive covenant to the whole of an estate (and not to each part) did not preclude express assignment of the benefit in respect of the whole or any part of the covenantee's land. It was argued that express annexation and express assignment were mutually exclusive ways of passing the benefit, on the basis of certain judicial classifications of restrictive covenants,[24] which, in effect, suggest that they are of two distinct kinds—those annexed to the covenantee's land, and those making his land more saleable.

Ungoed-Thomas J. rejected the argument that the benefit of the former kind should pass only by annexation, and the benefit of the latter only by express assignment.[25] Indeed, these classifications appear to serve no useful purpose. All restrictive covenants which are capable from their inception of burdening freehold land (that is, by complying with the requirements of stage 1 above) are of the same kind, and may pass to successors of the covenantee in any of the ways described in stage 3 above.[26] Confusion results

[19] [1964] Ch. 38 at p. 47.
[20] [1966] 1 All E.R. 937 at p. 943.
[21] [1967] 1 All E.R. 339 at p. 345; in any case, Goff J. held that the words of the covenant were more within the first than the second limb of Romer L.J.'s dichotomy—*ibid.* at p. 346.
[22] [1967] 1 All E.R. 339 at p. 346.
[23] [1967] 3 All E.R. 514.
[24] *Osborne* v. *Bradley* [1903] 2 Ch. 446, *per* Farwell J. at p. 450; *Marquess of Zetland* v. *Driver*, *supra*; *Re Pinewood Estates*, *Farnborough*, *supra*.
[25] "The classifications made in different ways, directed to different matters in different judgments, and sometimes even in the same judgment, were merely to clarify the reasoning and not to establish hard and fast categories mutually exclusive for all purposes." [1967] 3 All E.R. 514, *per* Ungoed-Thomas J. at p. 519.
[26] "The protection of land *qua* land does not have any rational or indeed any human significance apart from its enjoyment by human beings, and the protection of land is for its enjoyment by human beings. The capacity to dispose of it more advantageously is one recognised form of its more advantageous enjoyment." [1967] 3 All E.R. 514, *per* Ungoed-Thomas J. at p. 519.

from a failure to distinguish between the issues of construction in stage 1 (*c*) and stage 8 (*b*) above, that is, between whether a covenant relates to land of the covenantee at all (a circumstance which may appear from words of annexation or otherwise) and whether a particular successor to the covenantee can claim that the benefit of the covenant has passed to him by virtue of express annexation.[27]

Ungoed-Thomas J. stated that the way in which the benefit of a restrictive covenant might pass was in every case a matter of construction of the contract between the covenantor and covenantee, with the rules of equity providing only presumptions of intention; so that " . . . express assignment of the benefit of a restrictive covenant can only be forbidden if it is positively excluded; and automatic assignment of the benefit with the passing of the covenantee's land can only be permitted if it is positively included." [28] But is it necessary to rate the control of the parties over the future passing of the benefit so high, given that they have deliberately created a restrictive covenant rather than a covenant in gross? As the Law Commission has recognised,[29] the less like contracts and the more like easements restrictive covenants could become, the less would be the difficult issues of construction that encumber this part of the law.

J. W. HARRIS.

ACTUARIES AND THE ASSESSMENT OF DAMAGES FOR PERSONAL INJURIES

Fletcher v. *Autocar and Transporters Ltd.*[1] concerned the assessment of damages when a 56-year-old man, earning £8,000–£4,000 per annum after tax, was reduced to a vegetable existence as the result of a car accident for which he was not to blame. His expectation of life, sixteen years, was unimpaired. At the trial Cantley J. had grouped the damage under the headings of (i) loss of future earnings (£82,000) [2]; (ii) expenses involved in keeping the plaintiff

[27] It is submitted that this confusion appears in the suggestion that annexation of the benefit of a restrictive covenant may be implied, which appears in Megarry and Wade's *Law of Real Property* (3rd ed.), at p. 765. The cases referred to in support of this suggestion (*Newton Abbot Co-operative Society Ltd.* v. *Williamson and Treadgold Ltd.*, *supra*, and *Marten* v. *Flight Refuelling Ltd.*, *supra*), which dealt primarily with issues in stage 1 above, are treated by the authors as though they were primarily concerned with the issues in stage 8 (*b*) above.

[28] [1967] 3 All E.R. 514 at p. 520. It is difficult to reconcile this view with Ungoed-Thomas J.'s opinion that the covenantee or any express assignee of the benefit of the covenant can unilaterally annex the benefit—*ibid.* at pp. 520–521.

[29] Report on Restrictive Covenants, 1967, Law Commission Paper No. 11.

[1] [1968] 1 All E.R. 726.

[2] The assumption was that he would continue full-time work till the age of 69 and thereafter do some work on a part-time basis. Diplock L.J. at p. 740G-H. disliked this since he felt 60–65 is a more realistic retiring age (except for judges?).

in the local infirmary (£14,000); and (iii) damages for pain and suffering and loss of amenities (£10,000). To these he added the agreed special damages and arrived at the " truly daunting figure " of £66,447 9s. 6d. The Court of Appeal (Lord Denning M.R. and Diplock L.J., Salmon L.J. dissenting) reduced this to £51,447 9s. 6d.

The most significant differences of opinion concerned (i). With regard to (iii), pain and suffering, all the judges agreed that any figure was arbitrary, Salmon L.J. merely disagreeing on the ground that the general level of damages was too low.[3] The court unanimously felt that (ii) was over-generous and reduced it.

In the assessment of loss of earnings Cantley J. had received the help of an actuary. At the outset it was clear that the majority of the Court of Appeal misunderstood the nature of actuarial evidence.[4] For example, Lord Denning thought it did not allow for contingencies " such as illness, accident, bad trade and so forth " [5] nor for the fact that compensation was a lump sum whilst earnings would be spread over many years. Diplock L.J. agreed, saying that actuarial estimates " provide useful arithmetical data which a judge should have in mind, but do not allow for all the chances and changes of this mortal life." [6] He distrusted the application of averages to a particular situation.

A number of comments may be made: if actuaries really were as hopelessly unscientific as these criticisms imply, the continuing profits of insurance companies could only be explained by consistent divine intervention. Obviously actuaries are fully aware of the problems as even the most cursory reference to the literature would show.[7] Though no doubt judges (or any other articulate persons) are entitled to enumerate the contingencies, the precise discount made for them should be more scientific than the judicial hunch.[8] For example, judges customarily make a deduction of 10 per cent. for contingencies like sickness, unemployment and strikes, etc.; however, it appears that statistically the figure is almost universally agreed at 2 per cent.[9] and Professor Street says that the range of

[3] p. 750G-H. See on this the important note by Hamish R. Gray in (1964) 27 M.L.R. 723–727.

[4] Salmon L.J. did not (pp. 745H-I, 746E-F), though he thought the same results could be obtained by rule of thumb (p. 746H).

[5] p. 734I.

[6] pp. 739–740.

[7] Most of the formulae used to overcome these problems are to be found in an early paper by Miles M. Dawson, " Valuation in Actions for Damages for Negligence of Human Life Destroyed or Impaired," Proc 4th Int. Congress of Actuaries (1904), Vol. I, p. 929. Lawyers' doubts are most easily resolved by reference to William Phillips, " What is this thing called *e*? " (1965) 109 S.J 722. More recently reference should be made to a paper, " Actuarial Assessment of Damages," by J. H. Prevett, F.I.A., read to the Institute of Actuaries on April 22, 1968, from which many of my references are obtained.

[8] *Pace* Winn L.J. in *Watson* v. *Powles* [1967] 3 All E.R. 721, 724; see note 15 (*infra*). Also see John C. Walker continuing " Loss Element in Damage " (1967) 111 S.J. 223–225.

[9] A. T. Traversi, " Actuaries and the Courts " (1956) 29 Australian L.J. 557.

variation could hardly go above 6 per cent.[10] It is also faintly ridiculous for a judge to "include death as a contingency in making a deduction from an estimate of the annuity value or from an assessment based on the expectation of life."[11] Clearly actuarial calculations are not based on assumptions being certainties as Diplock L.J. thought[12] but on probabilities.[13] Indeed his assertion that no allowance should be made for inflation because we are no more likely to be wrong by treating the economy as standing still[14] is more certainly wrong on the evidence of recent economic history than any of the actuarial calculations he criticises.[15]

These judicial doubts are due almost as much to uncertainties concerning the purpose of damages as to distrust of actuaries. Lord Denning said that the principle is not to provide perfect compensation (which is impossible) but to give fair compensation.[16] Diplock L.J. agreed,[17] adding that assessment of the "degree of deprivation" must be arbitrary. However, bearing this in mind, we may well ask with Salmon L.J. what is the precise difference between perfect compensation and what is fair and reasonable.[18] Certainly Lord Denning breaks new ground in the assessment of damages for loss of earnings when he says that these are only to the extent of keeping the plaintiff's wife in comfort for the rest of her life,[19] but then assesses them so that the gross figure produced by their investment is only three-quarters of the plaintiff's prior net

[10] Street, *Principles of the Law of Damages*, pp. 124–125. Elliott and Street, *Road Accidents*, p. 232.

[11] Prevett, *op. cit.* para. 84: also see para. 9, "Judicial Misconceptions."

[12] p. 740C.

[13] See *per* Salmon L.J. at p. 746B–C.

[14] p. 741E. Elliott and Street, *op. cit.* pp. 232–238.

[15] The submission of actuarial evidence is standard practice in South Africa: see Howroyd and Howroyd, "The Assessment of Compensation for Loss of Support" (1958) 75 S.A.L.J. 65. It is recommended in a report by Justice, "The Trial of Motor Accident Cases" (Stevens, 1966), para. 70. Recent English decisions, however, have not been encouraging, *e.g.*, *Watson* v. *Powles* [1967] 3 All E.R. 721, 724C, where Winn L.J. (Chairman of the Law Commission Committee on Personal Injuries Litigation) said: "I am sorry to say that I remain quite unconvinced that, at present at least, the actuarial approach or technique affords the court such a precise tool as it would desire to have in its hand, if it were . . . compelled to set aside instinct in favour of what has been called . . . the rational approach."

[16] p. 733B. Though this is clearly right with regard to non-pecuniary loss (pain and suffering) at least since *B.T.C.* v. *Gourley* [1956] A.C. 185 and *West* v. *Shephard* [1964] A.C. 326, 346, it is still the law in relation to pecuniary loss (*e.g.*, earnings) that the damages awarded "should as nearly as possible . . . put the party who has been injured . . . in the same position as he would have been in if he had not sustained the wrong . . .": *per* Lord Blackburn in *Livingstone* v. *Rawyards Coal Co.* (1880) 5 App.Cas. 25, 39. However, the effect of *Watson* v. *Powles* [1967] 3 All E.R. 721 (C.A.) is to blur the distinction since "it is not the judge's duty to divide up the total award into separate items": p. 733D, *per* Lord Denning M.R. Winn L.J. agreed to p. 724F. See *per contra* Justice Report (*supra*), para. 70.

[17] p. 736B.

[18] p. 750E.

[19] p. 735C.

earnings [20] and no allowance is made, *e.g.*, for the fact that this will count as unearned income.

The courts are not entirely to blame; the problems of assessment are aggravated by the need to award a single lump sum instead of periodical payments,[21] which can be reviewed to allow for inflation and other changed circumstances, and by the fact that, in spite of themselves, the judges are not content to give fair and reasonable compensation but try to be too precise. For instance, both Lord Denning and Diplock L.J.[22] discuss overlapping of the heads of damage and say that to deprive the plaintiff of pursuing his hitherto sybaritic existence is to save him money and therefore this should be allowed for either in the assessment of earnings or in loss of amenities. The fallacy of this argument was exposed by Salmon L.J.,[23] who pointed out that in an extreme case a defendant could claim that by maiming the plaintiff he had curtailed the latter's previous extravagances to such an extent that there remained a credit balance in the defendant's favour.

Fletcher is a most difficult case. Though " the damages awarded should be such that the ordinary sensible man would not instinctively regard them as either mean or extravagant," [24] Lord Denning is right when he says that, whatever the figure, beyond a certain point it can do nothing for the plaintiff.[25] It is the reasoning he adopts for reducing the damages which is so unconvincing. To award damages which are too high, he says, might ruin small insurance companies and the " impact spreads through the body politic " in the form of increased premiums.[26] This ignores the fact that small insurance companies reinsure and that though large amounts can be awarded for personal injury claims, these do not account for more than 20 per cent. of the sums they pay out.[27] In any case, as Salmon L.J. pointed out, such speculations are irrelevant. " I take the, no doubt, prosaic view," he said, " that if a plaintiff is likely to be prevented by the defendant's negligence from earning £X a year for Y years, he is entitled to be compensated for the whole amount of that financial loss." [28]

J. C. HARPER.

[20] Though the plaintiff's income fluctuated Cantley J. had assessed it at £4,000 p.a. and Salmon L.J. said: " this conclusion was amply supported by the uncontradicted evidence ": p. 746C.
[21] See Justice Report (*supra*, note 15) at para. 73 and para. 22 (two-stage trials).
[22] At pp. 734D and 737F–G respectively.
[23] p. 748B–F.
[24] *Per* Salmon L.J. at p. 750G.
[25] p. 738H–L.
[26] p. 738G.
[27] Apparently 40 per cent. of premium accounts is spent on administration.
[28] pp. 748–749.

REVIEWS

CENTRAL DEPARTMENTS AND LOCAL AUTHORITIES. By PROFESSOR J. A. G. GRIFFITH. [George Allen and Unwin Ltd. 1967. 578 pp. including index. £8.]

PROFESSOR GRIFFITH has ably carried out the difficult task of reviewing the relationships between central departments and local authorities within the somewhat restricted area of six major local government services. These are uncharted waters but he has had the benefit of his research being sponsored by the Royal Institute of Public Administration and also of an advisory committee with a distinguished membership taken from the universities, civil service and local government. The book is a tribute to the detailed nature and thoroughness of his research, but in spite of the fact that Professor Griffith has served as a member of both a county council and an urban district council, and the fact that he and his research team visited about a hundred local authority departments, one cannot escape the feeling that he must have taken nearly all his information from the centre and comparatively little from the local authorities themselves. Indeed such is the wealth of detail of the administrative processes and of statistics that this could not be otherwise. Criticisms of the present arrangements are occasionally made but not with the fire with which local authorities sometimes speak. This is the account by an academic of the relations of central departments with local authorities and one would wish for a counterpart by a novelist dealing in more emotional terms with the relations of local authorities with central departments. As Professor Griffith himself says "the central departments may encourage or may forbid, may seek to persuade or may frustrate. But in all this, the first actor is usually, and the last actor is always, the local authority." And again "it is a pleasant and comforting evasion of the problem created by the existence of these two political groups—the departments and the local authorities—to say that they act as partners. In the broadest terms their interests may be the same: to promote the public welfare. But they are also stationed in opposition to one another."

The book will be of immense value to those studying this rapidly shifting scene, and it is in no way casting doubts on this value to express the hope that it will become rapidly out of date. There have indeed been changes even in the short period since the book was written, changes in Ministries, changes in highway classifications, in housing subsidy schemes and in the system of controlling house building by local authorities. More major changes are promised in, for example, the general grant formula, but even more important than these, there are to be the radical alterations which will follow the implementation of the proposals of the Royal Commission on Local Government and, for that matter, the implementation of such of the proposals of the Maud Committee on Management of Local Government as find favour. All these prospective changes are matters of which Professor Griffith is well aware and has touched on in his book. One hopes that when they come about he will be able to write a new edition displaying a much more reasonable state of affairs than now exists.

A common thread running through the chapters dealing with the six chosen major services is the demonstration of better results achieved and treatment obtained by the larger authorities. It is made clear, for instance, how larger authorities can better plan and seize their opportunities to carry out schemes for schools, houses and highways. It is to be hoped that the Royal Commission on Local Government will take notice of this reason and

ensure, by the creation of stronger authorities throughout the country, that any apparent unfairness in the present system is removed.

Two or three statements should perhaps be put in issue. On page 55 it is said that "it is rare for a local authority to reject a departmental policy, clearly set forth in a circular." Local authorities are not so pusillanimous: they are quite capable of ignoring not only circulars but even Acts of Parliament if they do not think fit to carry them out. On page 252 and again later in the same chapter the impression is given that it is common for the Ministry of Housing and Local Government to have to bring pressure on local authorities to carry out their slum clearance. This may be so in some cases but in general local authorities are only too anxious to revive their towns and feel restricted by the central departments in their attempts to do so. On page 811 there is a description of a method of passing the blame to the Ministry for some part of a county plan unwelcome to a county district: surely no normal county council would resort to such Machiavellian tactics.

Professor Griffith forms some comforting opinions in his general conclusions. For example, "the antagonism which from time to time arises between the groups is an indulgence which each can afford because both recognise this necessary inter-dependence. Each views the other with some reserve which occasionally retreats into suspicion. But each respects the intention of the other." However, he also points to dangers: the recurrent theme of the earlier chapters is that "the multiplicity of local authorities impedes the introduction of reforms designed to free local authorities from departmental controls" and this very multiplicity has led to the setting up of separate bodies such as regional economic planning boards and councils which are not representative of local government. One hopes that the lessons to be learned from Professor Griffith's book will have their effect on the formation of the new framework of local government, the allocation of functions to new authorities and the spirit in which the new authorities will be allowed to carry out their functions.

H. B. SALES.

COMMONWEALTH AND COLONIAL LAW. By SIR KENNETH ROBERTS-WRAY, G.C.M.G., Q.C., M.A. (OXON.) [London: Stevens & Sons. 1966. liv and 1008 pp. £8 10s.]

THIS is a remarkable book. Whether Sir Kenneth Roberts-Wray likes it or not, his work will inevitably be labelled "monumental." Nothing that has been written on the subject can stand comparison with it. Tarring's *Law Relating to the Colonies* is both antiquated and inadequate, and *Halsbury's* competition is but fitful. The pity is that no such book was available when it was most needed. That the definitive work on the basic law of British dependent territories should appear only when the colonial empire was in the later stages of dissolution is paradoxical. But, as Lord Denning remarks in his Foreword, these are vain regrets. Sir Kenneth, who was uniquely equipped to write the book, was unable to begin the task till his retirement from the post of Legal Adviser to the Colonial Office, and the necessary research took several years to complete. His labours have not been wasted; much of the area covered is still living law, and for the rest we have authoritative vignettes of legal and constitutional history.

The first chapter is a long and penetrating analysis of statutory and conventional terminology used in connection with Commonwealth affairs. On a number of points the author joins issue with other writers on constitutional matters. There follows a short general chapter on the Commonwealth, including the incidents of membership. The next three chapters, on the acquisition and transfer of territory, and authority over dependent territories, are excellent; they cover nearly 150 pages, embody a good deal of new thinking, and in

particular constitute an invaluable source of reference for anyone who has to give advice or write on the relevant aspects of the royal prerogative. Although the author deals mainly with United Kingdom law and practice, he also examines the position in Australia and New Zealand.

Chapter 6 is on the transition from dependence to independence. Here one is on more familiar ground, and the treatment of Dominion status and Independence Acts is not exhaustive. A tardy reviewer, having acquired the advantage of hindsight, may perhaps be forgiven for expressing regret that Sir Kenneth has dealt rather cursorily with the international capacity of territories lacking full independence; the importance of this topic has grown with the subsequent emergence of associated statehood in the Caribbean. On the other hand, there is a good short discussion of the complex issues raised by state succession to international obligations on the attainment of independence. Sir Kenneth also tries his hand at constitutional autochthony, and offers a very interesting analysis (which will be new to most of his readers) of the special case of Western Samoa. But I am bound to say that I find autochthony, when conceived of as a strictly juridical concept, bleakly austere and unworthy of the amount of attention that many students have been devoting to it. Suggestions to the effect that if a new constitution for an independent state were to be adopted in a manner unauthorised by the pre-existing legal order the judges are entitled or even obliged to pronounce it null and void are exercises in legal logic, but as yet nothing more. Irish judges in 1987, and Indian judges in 1950, might have held the new "autochthonous" constitutions of their countries to be invalid on such grounds; they did not, and it would indeed have been astounding if they had refused to accept the validity of the constitution. The convoluted reasoning of the Federal Court of Pakistan in *Tamiruddin Khan's* case, indicating that the court would not have recognised a constitution enacted without the Governor-General's assent, ought not to be taken too seriously. It is perfectly clear, as the Chief Justice later admitted in an appallingly frank address, that at that time the court thought it to be politically necessary to reach conclusions which would avert a major conflict with the Executive. The fact that after UDI the Rhodesian courts at first held the autochthonous Smith Constitution to be of no effect may prove something, but I am not sure what it is. Where new constitutions have been introduced by unconstitutional means in independent Commonwealth countries (as in Pakistan in 1958 and in Uganda in 1966), the judges, praying Hans Kelsen in aid, have accepted their validity. That it is prudent for constitution-makers to observe the law may be conceded. However, in predicting what attitude judges are likely to take towards a constitution adopted by an irregular procedure it is unrealistic to disregard the political context.

There follow chapters on the Executive, the Legislature (dwelling mainly on legislative powers), the Judicature and the Public Service. Emphasis is placed more on the position in dependent territories than on the constitutional laws of independent Commonwealth countries. Perhaps the most valuable sections are those on the status and functions of law officers (pp. 349–355), the principles applied by the Privy Council in entertaining criminal appeals (pp. 437–448) and the law relating to tenure of judicial office (pp. 485–505). Then comes a major chapter entitled "Basic Law," by which Sir Kenneth means "the general body of the law which the courts will apply when other provisions are not made by statute." He considers the circumstances in which British statute law, the royal prerogative, English common law rules and judicial decisions, other imported laws and local customary law will be applied. The main text concludes with chapters on legal proceedings, removal of prisoners, sovereignty and title to land (in which a clear distinction is drawn between territorial proprietorship or jurisdiction, on the one hand, and property rights on the other), and miscellaneous legal matters.

There are three appendices. The first runs to over 250 pages, and consists of short notes on the constitutions and basic law of all the individual Commonwealth countries. This is most valuable; the fact that much of the constitutional law has already passed into constitutional history is not particularly important. Some of the historical information (*e.g.*, on British Honduras and Pitcairn) is very hard to come by elsewhere. The second appendix gives the texts of some of the main statutes, and the third contains extracts from 25 leading cases.

The work is meticulously accurate, and Sir Kenneth has devoted a fair amount of space to exposing inaccuracy perpetrated by other writers. Some of the points that he takes are small; and it is questionable whether it is worth devoting the better part of a page to disclosing how Berriedale Keith, having correctly described (*sub nom.* Halsbury) the powers of a colonial legislature to commit for contempt, proceeded to contradict himself some years later in a misconceived opinion given in connection with an actual dispute. At page 265 he rightly criticises my own view, expressed in 1957, that the effective power to determine whether a dependent territory should be admitted to full membership of the Commonwealth rested with the United Kingdom because the other members could hardly withhold their concurrence once the territory had attained independence through United Kingdom action. The world has moved on since then. But I stand unrepentantly by my other opinion set out in the same passage; that foreknowledge of likely opposition by Commonwealth members might conceivably inhibit the United Kingdom from granting independence to a dependent territory. I had the Federation of Rhodesia and Nyasaland in mind. Did not the case of Southern Rhodesia support my view?

While admiring an almost flawless performance, one experiences a few jolts. In a system of responsible government, Ministers are not necessarily obliged to *resign* if they lose the confidence of the legislature (p. 64). (I was gratified to see that the passage from *Halsbury* cited in support of the proposition in the text was expressed in different language.) Why is Mauritius placed in Asia and St. Helena in Africa? Many of us will differ from the author's appraisal (p. 414) of judicial interpretation of the fundamental rights guarantees in Nigeria. And where is *Adegbenro* v. *Akintola*? But when there is so little to criticise and so much to applaud, it is inappropriate to dwell on minutiae. The work is a *tour de force*, a fitting sequel to a distinguished career spent in the public service.

S. A. DE SMITH

OMBUDSMEN AND OTHERS—CITIZENS' PROTECTORS IN NINE COUNTRIES. By WALTER GELLHORN. [Oxford University Press. 1967. xiii and 448 pp. (including index). 45s. net.]

WHEN so many problems of government and law are common to every modern country, it is amazing how little attention has been paid in the past to foreign experience and institutions. We expected our own ideas of parliamentary democracy and the rule of law to be imported into other countries but rarely thought in terms of ourselves importing ideas from abroad. Times change—the Law Commission is in the vanguard of comparative study, and both lawyers and political scientists have been displaying great interest in the Scandinavian institution of the Ombudsman. They will welcome this work of Professor Gellhorn of Columbia University, who visited all four Scandinavian countries in 1965 and 1966 to study the institution at work. He also visited New Zealand, where an Ombudsman has been active since 1962, and four other countries—the Soviet Union, Poland, Yugoslavia and Japan—to compare their particular versions of citizens' protectors. The results of these investigations, the factual descriptions of the work of these institutions and

also the author's assessment of their value, will be studied wherever there is concern to improve the relationship between government and governed.

Our own Ombudsman or Parliamentary Commissioner has been functioning for too short a time for anyone to judge his worth. Opinion on his first report to Parliament seemed uniformly sour ("ombudsman or ombudsmouse?" was one headline). A basic difficulty, much commented upon, is that so many areas of governmental activity (particularly local government) are beyond his reach. But some disillusionment was probably inevitable—a civil servant is not likely to compare with the Danish Ombudsman (Professor Hurwitz) in flair for publicity, and as another Ombudsman, quoted by Gellhorn, has said, the "ombudsman idea may have been a bit oversold by those who are enthusiastic about it" (p. 7). But there is another point and Gellhorn's study of the New Zealand Ombudsman is instructive in this respect. Just as in New Zealand, the main reason why the Parliamentary Commissioner will hardly ever seem to be marking up any great successes is that we do not suffer very much from maladministration: "The Ombudsman's job is to tidy up and improve an already commendable administration of the public's affairs" (p. 184). Far from finding numerous examples of malpractice among officials, New Zealand experience is that the Ombudsman is more often finding that fears and suspicions of malpractice are unjustified. This is not to say that officials bear no responsibility for the suspicion that something is wrong—civil service secrecy, backed by the doctrine of Crown privilege (now in demise) must bear some of the blame. But lack of communication and understanding between the Administration and the citizen are nothing like so dramatic and newsworthy as a Crichel Down scandal.

Japan has such different traditions from ours that any borrowing of ideas from that quarter seems unlikely. The author has rightly prefaced his account of Japanese institutions with a reference to Japanese deference to authority, their reluctance to engage in litigation and their tendency to seek some important person's influence when dealing with officials. But, unlike the Scandinavian countries where the Ombudsman idea has flourished, Japan has a large population (as we have) and has been concerned to establish not one citizens' defender located in Tokyo on the Scandinavian model but to have several thousand unpaid counsellors and civil liberties commissioners scattered throughout Japan. Professor Gellhorn says the counsellors have been dealing with a "gigantic caseload" and take their public relations work seriously—they even arrange for door-to-door delivery of handbills advertising their services. If at some time there is to be machinery in Britain for investigating complaints against local authorities, the Japanese experience may be worth remembering. Indeed, a well-publicised combination of the citizens' advice bureau, the counsellor, and the American neighbourhood law firm idea, may be the best way of giving the citizen at the local level an all-purpose institution for dealing with his complaints against both governmental and private malpractice.

GORDON BORRIE.

HUMAN RIGHTS DOCUMENTATION IN MALTA. By THE HONOURABLE MR. JUSTICE PROFESSOR J. J. CREMONA, LL.D., B.A. (Malta), B.A., PH.D. (Lond.), D.LITT. (Rome), F.R.Hist.S., Judge of the European Court of Human Rights, Vice-President of the Constitutional Court and the Court of Appeal of Malta, Emeritus Professor of the Royal University of Malta. [Malta University Press. 1966. 66 pp.]

THIS little book consists of documents exhibited at an international colloquy on human rights—with introductory comments and annotations by the editor. The documents include the historic Declaration of Rights of 1802, and basic

legal instruments laying down fair rules of procedure and evidence in criminal proceedings, fortifying the independence of the judiciary and abolishing censorship of the press. The last of the indigenous instruments was made in 1854; in Malta the principles of civil liberty are not a recent incorporation. The collection concludes with the chapter of the Independence Constitution dealing with Fundamental Rights and Freedoms. For the practical working of these guarantees, one need look no farther than the Privy Council's decision in *Olivier* v. *Buttigieg* [1967] 1 A.C. 115, holding that a government circular prohibiting civil servants from bringing the opposition newspaper on to government premises was unconstitutional. This decision provides the best possible answer to those who decry the practical value of judicially enforceable constitutional guarantees. And the Privy Council, in so holding, affirmed the decision of the Maltese Court of Appeal.

S. A. DE SMITH.

A CASEBOOK ON TORT. By TONY WEIR, M.A. (Cantab.), M.C.L., Tulane; a Fellow of Trinity College, Cambridge. [London: Sweet & Maxwell. 1966. xxiii and 519 pp. (with index). Bound £3 17s. 6d.; Paperback £2 2s.]

NOT many people read book reviews and those who do often seek their answer at the end. Here it is given at the start: this reviewer likes this book and has already recommended it to his students.

This, perhaps, is all that F. E. Smith would have troubled to write. Since, however, a review, like an opinion from anyone less self-confident than the lamented Lord Birkenhead, is expected to be somewhat more verbose: here goes—

No assessment is fair which omits to evaluate a work within the framework of the task which the author has set himself. Mr. Weir sets out his aim in his Preface—which *must* be read: "A casebook," he writes, "has several uses. It may be taught with . . . ; it may be learnt from . . . ; it may be used as a *bibliothèque de chevet*." (Your shameless reviewer was constrained to consult a dictionary about the latter word.) The author informs the reader that this is a book "designed primarily to be learnt from." That is to the good, since there are some of us who remain unimpressed by the casebook method of *teaching* and dare to think that Plato, Socrates and Langdell were tiresome old things. Perhaps it may even be allowed that the way to teach, and how very hard it is, is to seek to make simple that which is complex: not vice versa. We recall to our comfort Tribonian's warning—or does one sense the classroom voices of Theophilus and Dorotheus?—that it is dangerous *onerare "rudem adhuc et infirmum animum studiosi multitudine ac varietate rerum"*; "*quae*," not surprisingly, "*plerumque juvenes avertit*."

A casebook to be taught from is one thing, a casebook to be *learnt* from is another: and this is what the book under review is. Keir and Lawson's *Cases on Constitutional Law* was of a rather similar kind, and many of us recall our indebtedness to it. In the task he has set himself Mr. Weir has done exceedingly well and he improves his performance (Preface to be *read*) by stipulating that resort must also necessarily be had to a standard textbook: his book is not intended to stand alone, nor could it reasonably be expected to do so. Indeed, it is thought that a textbook must be read *first*. Mr. Weir's book stimulates more than it explains: but this is no criticism of it.

The work is divided thus. Introduction; Part I, Negligence; Part II, Liability Through Others; Part III, Trespass; Part IV, Law Between Neighbours; Part V, Animals; Part VI, Torts to Chattels; Part VII, Defamation; Part VIII, Wrongfully Causing Loss; Part IX, Damages. It would be otiose (although one easily might) to berate this order of subjects. For there can be no order ideally "right." Some for example may prefer

to find Vicarious Liability first, others last, others still in the middle: it really matters not a whit, since everything has to be explained and it cannot all be done at once. Indeed, in lecturing on Torts to first-year students one can be led to wonder whether it might be best to *define* the subject last rather than first; a description of a producible camel may really be more enlightening after than before the displaying of the beast.

Mr. Weir's Introduction may, it is thought, be a tough morsel for the tiro; though it has the merit of being short. To some it may also be considered sweet, since in it (p. 9) the author explains that "the word 'risk' does not solve the problems dealt with traditionally by means of the notions of duty and causation; it merely conceals them." So much for a new-found American toy. Though of course "foresight" (and to some extent later it is) might also have been thrown to the lions for similar reasons. In Part I Negligence is well covered (here the student simply *must* read a textbook first); and the author reveals his method. To some of the extracted cases he adds throughout his own contributions in the form of a Question or Questions, sometimes with and sometimes without an explanatory Note. Stimulate and explain; unexceptionable didactic method.

Space permitting but little we may pass to Part IV; "Law Between Neighbours." This embraces Nuisance and *Rylands* v. *Fletcher*: comfortable enough bedfellows but why make them a special bed? The author, in his Introduction to the Part, foresees the query, explaining to the reader that neighbours often trespass upon each other (and he might have added that they often exchange slanders and vulgar abuse) but justifies his joinery by remarking that in Trespass some "thing" comes across the "boundary" but that "you cannot break a close with a smell." You can with water though (*Rylands* v. *Fletcher*) and Mr. Weir is evidently out of date with the physics of sound: at certain pitches it is capable, so it is said, of breaking a battleship. Furthermore his partners fall out of bed when it comes to damage arising from public nuisance, which need have no connection with neighbours at all. One senses an urge to escape from the fact of history that torts have emerged haphazard with the evolution of the law. This proposition is ineluctable: so why not classify simply by taking separately, letting like follow upon most like, each of the multiple varieties of torts? "*Ca ce n'est pas à la mode*": but bother the fad if it doesn't make sense. At least the theory of "interests" does not overtly appear—a palpable absurdity since most torts cater for more than one interest; the author is to be congratulated upon this omission. Criticism of classification is of course really in any case no criticism at all.

Animals (Part V) receive but a wayward glance and perhaps their chaotic stables warrant no more; though a textbook must here be called in aid.

Torts to Chattels (Part VI) deserves high praise: a catastrophe of history lies duly exposed. Defamation (Part VII) is short but useful. Part VIII, Wrongfully Causing Loss. Surely this is a confusing name for the group of torts which inhibits business competition? And is not confusion worse confounded by including Malicious Prosecution in the group? Damages (Part IX) is allotted only 15 pages. Was the author getting weary of the job? Or were his publishers firm in keeping the work to 500 pages, and no more? If so they were right.

A little carping; but this book passes muster both in design and execution. Nothing, however, is perfect and a few notes of disapproval follow. To quote from p. 24—"The common law must . . . it does so by saying . . ." This solecism appears in a number of places. Statutes are made to "say" things too. If your students start telling you that "The Act says—" you will know where to lay the blame. We are reminded of a story told of the late G. L. Haggen, a former colleague. A student got up excitedly and exclaimed, "But Sir, if you were making a claim as the allegator . . ." Haggen commanded silence, raised his hand, and proclaimed, "Mr. Smith, if

ever I see an alligator rising in court to make a claim I shall SIGN THE PLEDGE." To quote from page 220 (of *Fowler* v. *Lanning*) "Fowler wrote in his statement of claim. . . ." Subject to correction (and at the risk of material for letters to *The Times*) *did* Mr. Fowler draft his own statement of claim? p. 221, "a person shooting on a moor . . . shoots a bullet." *We* do *not* use *bullets* on *our* Moors. Good clean fun and more could be had; but enough.

Further, at times, the author's style becomes donnish to the point of obscurity. Of course we are all dons, but take this (p. 9): "There is another word less Protean than 'duty,' and which is coming to supplant it. The word is 'risk.' It is a more modern notion, for while 'duty' has been with us at least since Antigone, risk was invented by the Merchants of Venice." We wish lawyers would, whether in court or out of it, forget about Proteus: we have had enough of him. The reference to Antigone is aggravating; for one thing she is by no means the only famous person to have had a "Conscience," for another thing *Donoghue* v. *Stevenson* might have been a less dramatic but better alternative. The reference to the Merchants of Venice evokes a mixed conception of Shylock and the Italian bankers, leaving a penumbra—presumably the right one—of insurance. Again (p. 349): "A legal system can set out to protect the owner of a thing or to safeguard the person who buys it in the normal course of business—the system can be either feudal or bourgeois." To which it may be remarked that the baronage, whether or no desirous of changing the law, must have been just as interested in the security of such transactions as they ventured to indulge in as a nation of shopkeepers are in clinging to their pelf. The fact is that the problem in question is not attributable to a cult of ownership on the one hand and a cult of acquisitiveness on the other (myths evoked by pseudo-sociology), but to the inevitable conflict between the innocent owner and the equally innocent receiver: Lord Holt had the answer (*mutatis mutandis*) in *Hern* v. *Nichols* and (see *Weir*, p. 352) so had Ashhurst J. in *Lickbarrow* v. *Mason*. A final extract at page 381—"So if we find that a person may be liable in defamation although he has acted reasonably or immune though he has acted unreasonably, this may be because there is a standard of truth which can be applied to what is said, over and above the standard of reasonableness which may be applied to the act of speaking." Checkmate to your reviewer; perhaps the learned student will understand. Passages like the above, and there are more, are thought to be no more than blemishes which it is hoped the author may think fit to weed out in the next edition; the advent of which is confidently predicted.

A word or two on the Questions and Notes. Stimulating as most of the questions are, some of them seem to assume too much: for instance, the Question immediately following *Donoghue* v. *Stevenson* (p. 18). Others seem pointless, *e.g.*, *à propos Best* v. *Samuel Fox*: "Do you think that the plaintiff should have recovered? If so, how much?" Are the student's views on the "should" important? How could he guess how much? It is hard enough for an experienced practitioner to say. Page 364: *à propos England* v. *Cowley*: "Did the plaintiff act reasonably?" This is a matter of opinion: the student is entitled to one, but what is it worth? This sort of question is fairly common and your reviewer (who may well be wrong) fails to see the point of it. The Notes are, one supposes, intended to instruct and very good most of them are; but at times there are falls from grace: *e.g.*, at page 442, after extraction from *Ratcliffe* v. *Evans* (at which time, if known as anything at all, the relevant tort was known as Injurious Falsehood) we get an extract from the Defamation Act 1952, s. 8, which—in deference to the author—"says" some things about "slander of title, slander of goods or other malicious falsehood." The Note starts off—"This is no new tort." "*What* is . . . ?" the student might excusably inquire. Is this, perchance, the Shade of Langdell? If so, invited or uninvited?

No mention has been made of the cases selected. The answer to this is

that nothing is more true than the oft-repeated assertion that any fool can write a casebook, because the fact is that as long as the cases are relevant the author of a casebook has wide freedom of choice. These cases are relevant, there are not too many of them and they were not selected by a fool. The author in his Preface does not forget, and your reviewer does not forget, that also in themselves the cases will be useful: a collection of cases in the room is worth at least the saving of time which would be taken going to a library. The young should not thereby be tempted to laziness; nor should the more mature. "Nevertheless" . . . thinks your reviewer, placing his copy of *Weir* beside a time-worn copy of *Kenny* on his shelf.

Good luck to *Weir*.

The publishers are to be congratulated upon the *format* of this book and upon the price of the paperback: the price of the bound volume is presumably inevitable in our "affluent" times.

P. S. James.

THE CRIMINAL LAW OF SCOTLAND. By GERALD H. GORDON, M.A., LL.B., PH.D., Advocate. [Edinburgh. W. Green & Son Ltd. 1967. lxxiii and 1104 pp. including bibliography and index. £12 12s. net.]

IT must be difficult for the English lawyer to appreciate how important an event the publication of any new work on the criminal law of Scotland is, let alone one on this scale. As the author points out in his introduction, "there has been no extended discussion of the principles of Scots criminal law since Hume's *Commentaries*." These were published originally in 1797, though the fourth and final edition was produced in 1844 by B. R. Bell. 1844 is, however, a long time ago and, while Hume had his successors, Alison (1832 and 1833) is dismissed as a mere repetition of Hume, Anderson (2nd ed., 1904, and an author of whom little is heard), we are told, gives no more than a brief treatment, while Macdonald (5th ed., 1948) Dr. Gordon (not without justification) regards as a confused and inaccurate digest. There remain only the three chapters in Smith's *A Short Commentary on the Law of Scotland* (1962) and the way for our tiro author (as he disarmingly styles himself) is clear. The gap is indisputable: to what extent has it been filled by the latest addition to the works published under the auspices of the Scottish Universities Law Institute?

Certainly, no one can dispute the work's size. Indeed, no branch of the substantive law has escaped discussion in exhaustive, if not exhausting, detail. The first book is devoted to a discussion of general topics such as the declaratory power of the High Court, the criminal mind, error, insanity, diminished responsibility, intoxication and necessity and superior orders, while the final 660 pages consist of a detailed examination of specific offences from murder to traffic, gaming and fishing offences. No aspect of crime is too insignificant for Dr. Gordon's scholarly and systematic probing, and certainly no other academic writer can approach his acquaintance with the grim realities of criminal justice as he served for several years as a procurator-fiscal depute (*i.e.*, prosecutor in the sheriff court) after practice at the Scots bar.

The author commences his Preface by remarking rather plaintively that the work has taken a very long time to write and the inevitable question is, was it really worth the effort? Clearly, not all large books are great ones but if this reviewer began reading as a duty, he continued as a pleasure and ventures the opinion that Dr. Gordon has produced the most distinguished work on the criminal law of Scotland since Hume and has every chance of finding himself elected to the select band of legal writers who become authorities in their lifetime. The work is far more than a digest providing potted accounts of cases but a systematic exposition of legal principle, illuminated not merely

by cases but ingenious fictitious illustrations, though Dr. Gordon gets rather mixed up amongst the B's and C's in the example discussed at pp. 290–291, while the example given in note 28 there hardly constitutes a problem either in the eyes of Scots law or common sense. Frequently critical of the decisions, the book states the law not merely as it is but as it ought to be. Dr. Gordon, indeed, combines practical experience with a marked capacity for conceptual analysis, particularly well seen in his examination of intention and motive, while his footnotes disclose the wide range of his reading, which extends beyond legal authors to the works of Bishop Butler and Professors Raphael and Ryle, and his citation of cases to those of the United States, South Africa and New Zealand. Even the Tanganyikan Penal Code (vintage 1945) gets a mention.

All this makes for stimulating reading, even where the author does not entirely disarm criticism. What, for example, is the point of including a passage on the failure of the public to respond to parts of the criminal law (pp. 19–21)? We do not need someone of Dr. Gordon's erudition to tell us people, by and large, have no compunction about cheating the Customs and it appears entirely irrelevant in a work on criminal law, as the author virtually admits, particularly as the conclusion he comes to is quite indeterminate—it may be inexpedient to punish such offences as public indignation is absent but, on the other hand, punishment may result in people taking them more seriously. Again, is it true to state, as Dr. Gordon does categorically (p. 779), that in the matter of provocation the effect of written words is likely to be less violent than those spoken and that it is difficult to accept them as constituting provocation at all? Further (p. 799), we are told that, while it is no defence to a charge of drunk driving that A fell asleep while driving as a result of drink or drugs, it would be a defence that he was so affected from the outset that he did not, at any time, intend to drive, and was throughout unaware that he was driving. This statement of the law must be interpreted in the light of *Cunningham*, 1963 J.C. 80, which Dr. Gordon deals with exhaustively in earlier pages (see p. 368 in this connection) but, at this point, does not refer to and, though the circumstances almost certainly constitute the technical defence of insanity, this is hardly the implication of the statement as it stands. Similarly, can it be right to suggest as the author does (p. 719) that if an accused acts in a transport of rage without appreciating what he is doing at all, he is entitled to a complete acquittal? This hardly suggests an acquittal by reason of insanity, which is surely the only alternative to a conviction of culpable homicide (or perhaps assault) at the least.

Dr. Gordon's book is, as is to be expected in a work that is not a mere textbook, rather too speculative and complex for the ordinary, as distinct from the honours, student, however rewarding to the law teacher and the practitioner, and the former will still find Professor Smith's "three comparatively short chapters" provide a concise and lucid survey of the law, a survey to which, in fact, Dr. Gordon himself frequently refers. In spite of the absence of authority, however, it seems likely Dr. Gordon is right (p. 752) in suggesting a housebreaker inadvertently causing death in the course of the breaking would not be guilty of culpable homicide nor (p. 76) would an innkeeper who merely neglects his guest's health, as Professor Smith suggests (pp. 187, 188).

Where both authors are at one is in their view that provocation by real injuries cannot justify (as distinct from mitigating) an assault (Smith, p. 142; Gordon, p. 777), the authority of Hume, Alison and Macdonald to the contrary notwithstanding, as these writers are regarded as having confused provocation with self-defence. Yet even on the assumption these earlier writers are confused, it is surely quite wrong to state (as Dr. Gordon does at p. 778) that it was said in *Crawford*, 1950 J.C. 67 that provocation is always a plea in mitigation, since Lord Keith says (p. 71) exactly the opposite, namely, that in assault provocation can be a plea either in exculpation or mitigation. Unlike

Professor Smith (p. 144), however, Dr. Gordon (p. 724) adheres to the view of Hume, Alison, Macdonald and others that provocation by words (confessions or boasts of adultery apart) does not serve to reduce the crime of murder to that of culpable homicide.

Two factors which have retarded a systematic exposition of the criminal law of Scotland are clearly presented in this book. One is the shocking absence of many of the leading cases from the pages of the reports and we must all be indebted to Dr. Gordon for his summaries of the facts and lengthy quotations from the records of some of these. The second is the control exercised by the Lord Advocate over criminal prosecutions. At pp. 711–718, the author lists what he describes as "the unofficial categories" where, in practice, a charge of culpable homicide is brought though, theoretically, the crime is murder and he points out (p. 888) that it is unlikely that Dr. Bourne would have been prosecuted in Scotland. The humanity of such an approach is incontestable but legal theory and, indeed, the development of the law itself the poorer.

Lastly, may the reviewer add that the very real pleasure he derived from reading this book was, if anything, enhanced by the knowledge that, like Homer, even Dr. Gordon occasionally nods? Lord Justice-General Inglis' judicial title was Lord Glencorse and it is quite wrong to refer to him as "Lord Inglis" (pp. 68 and 674). Also we are blessedly free from burglars (p. 222) in Scotland, though we do have housebreakers.

J. W. R. Gray.

A Sourcebook of the Criminal Law of Africa (Cases, Statutes and Materials). By Robert B. Seidman. Law in Africa Series: Number 21. [London: Sweet & Maxwell; Lagos: African Universities Press. 1966. xi and 646 pp. (with index). Hard bound £5 5s. net. Paper bound £2 5s. net.]

"No, no!" said the Queen. "Sentence first—verdict afterwards." Thus, despite the Roman proverb, even in Africa there is no new thing under the sun. In reporting the trial of the Knave of Hearts, Lewis Carroll anticipated the opening of this remarkable anthology, which covers many African and other common law jurisdictions, though not (as the cover jacket says) "every jurisdiction in Africa," for only anglophonic Africa is included.

Comment on a casebook must be confined to the areas which show the hand of the compiler. Mr. Seidman rarely shows his directly. This is a typical "American casebook," directing the reader what to think about, while leaving it mainly to him what he is to think about it. References to "Judge Devlin" or strange use of phrases ("Appellant killed his ex-wife. The deceased had promised to remarry him, and in fact anticipated remarriage on the day following the one on which she died," pp. 206–207) also suggest American origin.

His hand is more obvious when one studies his arrangement and selection; he is more a criminologist, even penologist, than criminal lawyer. Like the Queen of Hearts, he puts sentence first. "The final result of any criminal trial is to determine that the defendant is or is not guilty; and the ultimate result of a finding of guilt is that the defendant is sentenced. To answer the question of the objectives of the criminal law, the first obvious line of inquiry is to try to discover the objectives of punishment." He ends on responsibility, with the typical Wootton quotation demanding the "solution of allowing the concept of responsibility [to] wither away. . . . Forget responsibility and we can ask not whether an offender ought to be punished, but whether . . . he is likely to benefit from punishment." Repeatedly punishment is raised, which must be confusing to a student of criminal law, primarily the branch of the law concerned with the repression by the state or the public of anti-social

conduct. If crime is a disease, criminal law is directed to its identification and diagnosis, to discovering what conduct is stigmatised as criminal and why; it stops short of the preventive and curative measures which follow the verdict and form the subject of criminology or penology. So, in criminal law, while the West debates abortion and homosexuality, Africa faces the problems of abuse of power, corruption, extortion, nepotism and misapplication of public funds. These, for a book on African criminal law, seem to get very scant treatment.

It is true that Africa provides an interesting field for study of the modes of repression of anti-social conduct, ranging from social and religious censure, propitiation of spirits, compensation of families, loss of liberty, mutilation, death and so on. There may be little danger that Africa will be tempted to lavish on the preservation of the life of the depraved child-murderer money it cannot raise for the treatment of renal disease. Perhaps, learning from our mistakes, Africa may never tread this path. This book ought to be on the shelf of the judge, magistrate, minister of justice, legislator or anyone concerned with sentencing. It will be useful in the postgraduate criminology or penology course, containing as it does a mass of illustrations of unusual mental states and social situations. For instance, mistake—killing a man in the belief he is a ghost or a monkey; attempt and impossibility—trying to kill by incantations and so on. But the first degree student needs to learn first what the criminal law is, because it is there and he has to work with it. He has to be asked "what offences has X committed?" before he attempts the questions like "why?" or "what would you do about it?" which this book poses. For him this book is only likely to cause confusion; in fact, Alice sums it up:

"Stuff and nonsense!" said Alice loudly. "The idea of having the sentence first!"

P. J. SCHOFIELD.

NIGERIA: THE DEVELOPMENT OF ITS LAWS AND CONSTITUTION. By DR. T. O. ELIAS. [London: Stevens and Sons. 1967. v and 471 and (tables and index) 18 pp. £5 10s.]

IT would perhaps have been more appropriate if the title of this work, which is Volume 14 in the Commonwealth Series, had been reversed as the author deals with the development of the constitution at some length but pays surprisingly little attention to the development of Nigerian law. Recent events in Nigeria have led to an abrogation of much of the federal constitution and a change from the regional system of government. The system of government and the constitution described by the author may not in the view of many reappear at all as it seems to have met with a singular lack of success. While this may have been due to many other factors which are not the concern of this work, the complexity of the constitution and the federal system of government appear as ill-suited to a country like Nigeria. In fact, the first part of the book might well be described as the epitaph of federalism in Nigeria.

Apart, therefore, from this general problem of relevance, the first part of the work dealing with the history and background of the constitution and with the actual constitutional principles receives an adequate treatment. The account of the advent and early years of British rule is by now standard historical fact and adds nothing to our knowledge of the period; however, the account of the later constitutional struggles culminating in the independence constitution of 1960 is vested with the authority of a participant, the author having for some time been Attorney-General of Nigeria.

This part of the book also deals with the development of central government and includes accounts of the civil service, the police and, not surprisingly, a section on the development of the armed forces and courts-martial law

and procedure, a branch of the law which is of pertinent interest in the present Nigerian context. There are also chapters on local government, the public corporations, the regions, the judiciary, finance, and the relations between the federation and the regions, which go into some detail in describing the system of government. Here again the initial criticism of relevance to the present situation applies. There are two chapters on the constitution as such, dealing respectively with the nature of the constitution and with fundamental rights. It is really only in these topics that the author attempts a serious analysis of function rather than a descriptive account of institutions as before.

In the chapter on the nature of the constitution, the author deals with the doctrine of the supremacy of Parliament and its application to federal states through the medium of an examination of the various solutions proposed by other writers such as Wheare and Friedmann and comes to the conclusion for Nigeria that the doctrine of sovereignty was applicable to the federal Parliament and to the regional legislatures within their respective fields of competence, but that the federal Parliament had greater attributes of sovereignty than had the regions both in terms of internal and external powers and relations. The author goes on to discuss the supremacy of the constitution and the function of the Federal Supreme Court in determining the constitutionality of legislation. He makes the valid point that the Supreme Court has yet to establish its own body of rules for interpretation but indicates such trends as have come to light through the decided cases. The chapter on fundamental rights also contains some useful analytical discussion of the various rights and such cases as have been decided on them, but lacks the detailed treatment that might have been expected of such a topic.

The public law content of the book is sixteen chapters, while private law merits only seven chapters. To the reviewer's mind this is a serious imbalance as it would have been more appropriate, and surely of more lasting value, if the author had undertaken a comprehensive survey of the development of Nigerian law as such. As is well known, Nigerian law, in common with the laws of other ex-colonial territories, consists of a curious mixture of indigenous customary law, colonial statutes and metropolitan law. This mixture poses problems at every level from the internal conflict of laws to the demands that national aspirations be represented by a system of law applicable in every respect to every citizen. This book, surely, was a golden opportunity to examine these problems in terms of particular legal topics and show what attempts have been made to solve the difficulties. The lack of such an approach is much more serious when one considers the amount of material already published on Nigerian law, particularly in recent years, which the author could have used as a basis for such a discussion. Apart from in the earlier chapters, the only references to other published work are to various of the author's own publications. On private law the author's method is to paraphrase the relevant statutes, ignore the cases and published works and give only the barest outline of how the law has developed. A glaring example of this is the chapter on Land Law and Administration (Chapter 18). The reader is referred to the author's earlier work, *Nigerian Land Law and Custom*, the latest edition of which was in 1962, one case and a quick digest of some relevant statutory material. As other writers have shown, the legal problems involved in Nigerian land law are immense and this is to say nothing of the role which land law can and should play in a developing country and which, therefore, should merit some discussion.

Another major criticism of this work is the absence of any mention of Islamic law apart from a brief description of the Shari'a Court of Appeal in Northern Nigeria. The seriousness of this can be judged from the fact that Islamic law governs family relationships in the Muslim communities of both Northern and Western Nigeria and land and commercial law among Muslims

in Northern Nigeria and that these communities represent a large proportion of the people of Nigeria. Surely such an important system of jurisprudence should have merited a chapter on its own or, at least, integration with the other topics of private law?

It is only in the chapter on Commercial and Mercantile Law (Chapter 22) that any attempt is made to relate the case law to the legislation. For this reason the chapter stands out as an example of how other topics should have been treated and should prove useful, particularly to a foreign businessman and his advisers.

It would be possible to elaborate these criticisms in terms of every individual chapter on private law, but this must give way to a general criticism relating to the relevance of some of the chapters in the latter part of the book which seem to have been included merely to show that a particular branch of law exists in Nigeria. I refer in particular to the chapters on Laws relating to the Professions (Chapter 21), Industrial Law (Chapter 28), and the final chapter which deals with Nigeria under military rule. It is interesting to be told that "... goldsmiths have always been of considerable importance in the social life of Lagos and of the other large towns in the federation . . ." (p. 401), but is it relevant to what should be a discussion of the more fundamental principles of Nigerian law? The same goes for medical practitioners, dentists, midwives, etc. Industrial Law obviously is a topic which is important but not at the present time as there is virtually no case law on the subject, unless a would-be industrialist merely wants a convenient list of relevant statutory material. The value of a chapter on Nigeria under Military Rule is doubtful, both as an attempt to write "instant" history and because the legal consequences of such rule cannot at present be evaluated.

It is difficult to recommend this book to any category of readers; the Nigerian lawyer or student is already well provided for; the comparative lawyer or student will not find sufficient depth or detail for a genuine comparative study while a general reader will realise that the general part of the book is out of date. It would be invidious to labour the book's shortcomings at greater length, but one blemish should not pass unnoticed. For a book published in 1967 to talk about in relation to Ghana: "the overwhelming ascendancy of the Convention People's Party under the charismatic leadership of Dr. Kwame Nkrumah" (p. 142), shows at best regrettable editing standards and at worst a disregard for the feelings of a neighbouring people who suffered under that very charisma.

C. M. McDOWELL.

NATHAN AND MARSHALL'S A CASEBOOK ON TRUSTS. Fifth Edition. By PROFESSOR O. R. MARSHALL. [London: Stevens and Sons. 1967. i–xxx and 509 pp. (with index). Bound £4 10s. net. Paperback £2 2s. net.]

NATHAN'S *Equity Through the Cases* has always been a powerful help to students in studying what they naturally regard as a daunting and difficult subject. The various branches of property law inevitably have a chill reputation. Their subject-matter seems, at least on the surface, to be largely divorced from all human colour except the acquisitive instinct and to register in students' minds as something alien and repellent in its complexity.

The great effectiveness of *Equity Through the Cases* as a weapon against this discouragement rests on its combination of exposition and case extracts. This goes as far as is reasonably possible to dispel for students the obscurity of the law without creating any pretence that it is not difficult. The trouble in the past has been that the scope of the book was uncertain. It was in practice mostly, but not completely nor officially, *Trusts through the Cases*.

Some three-quarters of the text was taken up with trusts and the rest allotted to other aspects of equity. Most lawyers would no doubt agree that either a book should confine itself to trusts or else a book on equity should give an important but not a preponderant part of its text to trusts.

Professor Marshall, having edited all editions of *Nathan* other than the first, has now corrected the balance. The fifth edition is expressly reconstituted as *A Casebook on Trusts*; and a separate casebook on the rest of equity by Mr. John Tiley is promised. Professor Marshall describes this in his new preface as "a change that I have long wished to make of confining this book exclusively to the law of trusts."

There has been some rearrangement and the latest cases and statutes dealt with. The book might helpfully say more than it does about the vitiation of trusts by bankruptcy and fraud of creditors; and a leading case in point which the book does not mention is *Re Eichholz*. That case also touches on the role of the vendor of land as trustee; yet this very topic, though economical of space, was singled out for omission from the new edition.

Forgetting minor grouses of this kind, it can be said with confidence that students and others will profit even more greatly from *Nathan and Marshall* now than they did before. It is most definitely a book to recommend.

KEITH DAVIES.

A BRITISH DIGEST OF INTERNATIONAL LAW. By CLIVE PARRY, LL.D., of Gray's Inn, Barrister-at-Law, Fellow of Downing College and Reader in International Law in the University of Cambridge. Vol. 2b. [London: Stevens and Sons: 1967. XXV and 804 pp. including index £9 9s.]

THIS volume, cited as 2b B.D.I.L., forms Chapters 7 (international waterways) and 8 (rights in foreign territory) in Part III (territory) of Phase One 1860–1914 of the *British Digest of International Law*, compiled principally from the Foreign Office archives and linked together with commentary. It is a fascinating treasure house. In the nineteenth century, before the advent of the Legal Adviser to the Foreign Officer, the Law Officers needed to be experts in international law in addition to their other duties. The lapse of the office of Queen's Advocate, a kind of third Law Officer, in 1878 is much to be regretted. The chapter on international waterways discloses that in 1857 Great Britain paid £1¼ millions to Denmark in return for the abolition of the Sound Dues, gives the documents relating to the Turkish Straits, shows how creditable to the British and Canadians the present arrangements for the St. Lawrence are, and discloses that Great Britain was originally opposed to the building of the Suez Canal (a French venture). Gibraltar, the Rhine, the Panama Canal and many others are discussed. The chapter on rights in foreign territory throws a lot of light onto the vexed juridical question of whether international servitudes can exist in international law. The North Atlantic Fisheries Arbitration 1910, the I.C.J. Goa case in 1960, and the demilitarisation of the Aaland Islands are all documented, as well as other economic rights such as logwood cutting in the Bay of Honduras and the gum trade in Senegal. This beautifully produced volume stands as a remarkable tribute to Dr. Parry's immense scholarship. But for his work and the generosity of the International Law Fund much of this material might have been lost instead of being preserved and illuminated for posterity.

ALEC SAMUELS.

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THE COMPANY AS A SEPARATE LEGAL ENTITY

UNDER English company law the company is a separate legal entity. Yet, although this is a fundamental concept, it has proved extremely intractable to define and to describe satisfactorily. The difficulties experienced by the courts from time to time in separating the company as a legal entity from its members are evidenced by the remarkable range of judicial expletives or, in Younger L.J.'s phrase, " term[s] of polite invective," [1] which they have used on appropriate occasions to describe corporations, including, for example, " a mere nominee," " a mere fraud," an " agent," " a trustee," a " mere device," " a myth and a fiction," [2] " a pretended association," [3] a " bubble," [4] an " unreal " procedure, " a cloak," [5] " an alias," " a name," [6] " an artificial legal thing," " a legal abstraction," [7] " mere machinery," [8] " a metaphysical conception," [9] " a sham or bogus," [10] " an abstract conception," [11] a " simulacrum," [12] " a cloak," [13] a " mere alter ego," [14] " an abstract being," [15] a " creature," [16] " a screen " [17] and even

[1] *I.R.C.* v. *Sansom* [1921] 2 K.B. 492 at p. 514 (C.A.).
[2] *Broderip* v. *Salomon* [1895] 2 Ch. 323 at pp. 330, 331, 338, 339, 341.
[3] *Salomon* v. *Salomon & Co.* [1897] A.C. 22 at p. 32.
[4] *Re Carl Hirth* [1899] 1 Q.B. 612 at p. 619.
[5] *Att.-Gen. for Dominion of Canada* v. *Standard Trust Co. of New York* [1911] A.C. 498 at p. 505.
[6] *Re Darby* [1911] 1 K.B. 95 at p. 101.
[7] *Continental Tyre & Rubber Co. (G.B.) Ltd.* v. *Daimler Co. Ltd.* [1915] 1 K.B. 893 at p. 916.
[8] *Ibid.*, *sub nom. Daimler Co.* v. *Continental Tyre & Rubber Co.* [1916] 2 A.C. 307 at p. 316.
[9] *Lennard's Carrying Co. Ltd.* v. *Asiatic Petroleum Co. Ltd.* [1915] A.C. 705 at p. 715.
[10] *R.* v. *Grubb* [1915] 2 K.B. 683 at p. 691.
[11] *Houghton & Co.* v. *Nothard, Lowe and Wills Ltd.* [1928] A.C. 1 at p. 14.
[12] *E.B.M. Co. Ltd.* v. *Dominion Bank* [1937] 3 All E.R. 555 at p. 563.
[13] *Gilford Motor Co. Ltd.* v. *Horne* [1933] Ch. 935 at p. 965.
[14] *Pegler* v. *Craven* [1952] 2 Q.B. 69 at p. 79.
[15] *Austin Reed Ltd.* v. *Royal Assurance Co. Ltd.* (July 18, 1956, C.A., not reported; but cited [1956] 3 All E.R. 629).
[16] *I.R.C.* v. *Lithgows Ltd.* (1960) 39 T.C. 270 at p. 275. In the same vein a company has been likened to " a motor-car ": *Barclays Bank Ltd.* v. *I.R.C.* [1959] Ch. 659 at p. 671, by Lord Evershed M.R.: " The company is in this respect like a motor-car the speed and direction of which is controlled by the driver. . . ."
[17] *Barclays Bank* v. *I.R.C.* [1960] 3 W.L.R. 230 at p. 238.

" black sheep." [18] In *Re Bugle Press Ltd.*,[19] Harman L.J. added " a hollow sham " and an " elementary . . . device," going on to elaborate in more picturesque language [20]: " . . . the transferee company was nothing but a little hut . . ." whose legal existence could be likened to " the walls of Jericho "—" The minority shareholder has nothing to knock down, he has only to shout [21] and the walls of Jericho fall flat." The apparent need to resort to such terms indicates an unexpected degree of uncertainty on the part of the courts on some occasions when dealing with the separate existence of the company.[22]

Relatively few writers on English company law have made a determined attempt to unravel what R. S. Welsh has called [23] " the perplexities of corporate personality." In most of the texts the topic of separate legal entity as such is either ignored or dealt with only in an indirect or cursory manner. Professor Gower in *Modern Company Law* [24] is the notable exception, although even here separate legal entity is considered more elaborately in relation to its exceptions than to its substance.[25] The term " lifting the veil," which is sometimes employed to describe exceptions to the concept, is derived from usage in the United States [26] and has been adopted by a number of writers in this country but not, as yet, by the courts. It, too, lacks any precise and generally accepted definition. At least three separate and distinct meanings may be attributed to

[18] *I.R.C.* v. *Sansom*, *supra*, at p. 514. Younger L.J. did not manage to avoid himself the practice which he deprecated, of using such terms.

[19] [1961] Ch. 270 at pp. 288–289.

[20] *Ibid.*, at p. 288.

[21] Presumably within earshot of the High Court.

[22] *Cf.* also a " front " in *Clarkson Co. Ltd.* v. *Zhelka* (1967) 64 D.L.R. 457 at p. 458 and the American use of, *e.g.*, " department," " conduit " and " double."

[23] " The Criminal Liability of Corporations " (1946) 62 L.Q.R. 345 at p. 346.

[24] 2nd ed., 1957, Chaps. 4 and 10.

[25] *Ibid.* Chap. 10, entitled " Lifting the Veil."

[26] Nomenclature of this nature has not received universal approval in the U.S.A. H. W. Ballantine, for example, in (1948) 31 Calif.L.Rev. at p. 426, criticised the use of such " customary verbiage " as " disregarding the corporate fiction," because it " serves no purpose and obscures a clear understanding of what the courts are doing and what is the basis of doing it." There is nevertheless an extensive literature on this topic in the U.S.A., in addition to the works cited by Gower, *op. cit.* p. 188, n. 1. See H. W. Ballantine, " Separate Entity of Parent and Subsidiary Corporations " (1925) 14 Calif.L.Rev. 12; " Corporations: 'Disregarding the Corporate Entity' as a Regulatory Process " (1948) 31 Calif.L.Rev. 426; G. P. Canfield, " The Scope and Limits of the Corporate Entity Theory " (1917) 17 Col.L.Rev. 128; M. Radin, " The Endless Problem of Corporate Personality " (1932) 32 Col.L.Rev. 643; Horowitz, " Disregarding the Entity of Private Corporations " (1939) 14 Wash.L.Rev. 285; (1940) 15 Wash.L.Rev. 1. See also C. A. Maston, " 'One Man Companies' and their Controlling Shareholders " (1966) 14 Can.B.R. 663; and E. J. Cohn and C. Simitis, " 'Lifting the Veil' in the Company Laws of the European Continent " (1963) 12 I.C.L.Q. 189. English literature includes Gower, *op. cit.*; Palmer's *Company Law*, 21st ed. Chap. 17; Friedmann, *Legal Theory*, 5th ed., pp. 556–572; Martin Wolff (1938) 54 L.Q.R. 494 at p. 512 *et seq.*; Diss, *Jurisprudence*, 2nd ed., pp. 294–308; and Alec Samuels, " Lifting the Veil " [1964] J.B.L. 107.

it. First, it may mean that there is a "veil" (or "mask" or "curtain") between the members of the company and outsiders which is, in this sense, "lifted" when "the law goes behind the corporate personality to the individual members." [27] Secondly, a veil may be said to exist between the company and the members.[28] Thirdly, the term is sometimes used in a sense implying that several "economic realities" may be joined, or one economic entity divided, by a corporate "mask" or "veil." [29]

The fact that the concept of separate legal entity has often been formulated only in the most general terms may have very undesirable consequences. It has been the underlying cause of the use of nomenclature such as that quoted above, concerning which Younger L.J. said [30]: "I am quite satisfied that the indiscriminate use of such terms has, not infrequently, led to results which were unfortunate and unjust. . . ." More generally unless particular problems can be answered by reference to principles, relevant precedents may not be cited and there is a very real danger that the law may evolve in a manner which is "essentially haphazard and irrational." [31] These consequences are apparent also where exceptions are required, when, as it has been put,[32] "the realities of the situation" must prevail. At present there is no real consensus among writers, or indication from the courts, as to either the number of the categories of exceptions or of their extent.[33] For example, Professor Pennington, on the one hand, takes the view that four inroads have been made on the principle of the "separate legal personality" of companies.[34] Professor Gower, on the other hand, considers that there are a far larger number of such cases or "circumstances in which the law disregards the corporate entity." [35] From such divergent views the conclusion might well be indicated that the difficulties for the law associated with the separate existence of companies are similar to the well-known problem of the elephant, as being something which is extraordinarily

[27] Gower, *op. cit.* p. 188.

[28] See, *e.g.*, its use by K. W. Wedderburn in this sense in "Shareholders' Rights and the Rule in *Foss* v. *Harbottle*" [1958] C.L.J. 93 at p. 94. *Cf.* also the same writer's "Company Law—Members' Rights—Oppression of Minority" [1958] C.L.J. 152 and "A Corporations Ombudsman?" (1960) 23 M.L.R. 668. *Pavlides* v. *Jensen* [1956] Ch. 565 and *Berendson* v. *I.R.C.* [1958] Ch. 1 are usually cited as examples in this context.

[29] This application has been carried to its furthest extent by A. A. Berle, "The Theory of Enterprise Entity" (1947) 47 Col.L.Rev. 343. *Cf. Merchandise Transport Ltd.* v. *British Transport Commission* [1962] 2 Q.B. 173.

[30] *I.R.C.* v. *Sansom* [1921] 2 K.B. 492 at p. 514.

[31] Gower, *op. cit.* p. 209.

[32] *Tunstall* v. *Steigman* [1962] 2 All E.R. 417 at p. 421.

[33] *Cf.* the treatment of this topic in the works cited in note 26, above, and by Pennington, *Company Law*, 2nd ed., 1967, Chap. 2.

[34] *Ibid.* p. 42.

[35] Gower, *op. cit.* p. 188. *Cf.* K. W. Wedderburn [1958] C.L.J. 152 at p. 155: "What is urgently needed is a principle from which litigants can predict when the courts will, and will not, lift the veil of the corporate entity"; and (1960) 23 M.L.R. 668 at p. 666: "There is an urgent need for some principles to be injected into this area of law."

difficult to define in legal terms although in practice everyone who ought to probably realises what it is when he comes in contact with it.

As well as being of fundamental importance the separate legal entity concept is also of pervasive effect, for a great part of company law is derived from, or related to, it. Each instance in which it is recognised or applied adds another facet to its scope but the essential elements of the concept appear to be founded by three principles or groups of principles being those established to settle the three basic legal issues of the company's existence. These issues are, first, what is the *extent* of the company's legal competence; secondly, what is the *nature* of its legal capacity; and, thirdly, in what manner is its capacity to be exercised? Only when the principles answering these questions are considered together is their full significance apparent. Only when they are considered separately can the nature of the numerous exceptions which have been made be properly appreciated.

THE EXTENT OF THE COMPANY'S LEGAL CAPACITY

Companies differ from any natural person in that they can only acquire or be subject to a very much more restricted range of rights and liabilities than natural persons.[36] The former are subject to[37] "an original limitation and circumscription of their powers by the law," the underlying principle being that the company should be empowered only to the extent necessary to enable it to carry out its objects or purposes. A practical rather than a theoretical approach has been adopted by the courts to the required scope of these powers as is clearly illustrated in Lord Shaw of Dunfermline's description of the company[38]: "It is a creation of law convenient for the purposes of management, of the holding of property, of the association of individuals in business transactions. . . ."

This principle is given effect by a twofold limitation. First, the law requires companies to state their objects on incorporation and so to adopt themselves a restricted capacity.[39] Secondly, the common law imposes its own limitations upon corporate capacity.

Effect is given to the former restrictions by the law relating to *ultra vires*. Corporations, at an early stage in the development of English company law, were viewed as having general powers similar

[36] For this reason the description of companies as the *alter ego* of their controlling shareholders is true only in a very loose sense.

[37] *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1875) L.R. 7 H.L. 653 at p. 694, *per* Lord Selborne.

[38] *Daimler Co. Ltd.* v. *Continental Tyre & Rubber Co. (G.B.) Ltd.* [1916] 2 A.C. 307 at p. 329.

[39] Companies Act 1948, s. 2 (1) (*c*). All statutory references *infra*, unless otherwise indicated, are to this Act. The intended restrictive nature of s. 2 (1) (*c*) is easily avoided: see Gower, *op. cit.* Chap. 5, especially pp. 82–85; and more recently the decision of the Court of Appeal in *Bell Houses Ltd.* v. *City Wall Properties Ltd.* [1966] 2 All E.R. 674; noted by K. W. Wedderburn at (1966) 29 M.L.R. 678.

to those of natural persons.[40] Once a chartered corporation was created it had, in Coke's view, full powers, and clauses defining its objects were not necessary but only declaratory in effect.[41] The evolution of the doctrine of *ultra vires*, originating, apparently, in proceedings instituted in 1720 by the South Sea Company, which employed as its banker a company incorporated to manufacture sword-blades,[42] reversed this state of affairs for statutory companies. The powers of the latter became strictly limited by law to those necessary, either expressly or by implication, to allow them to carry out their expressed objects.[43] At a relatively late stage in the development of modern company law, in *Ashbury Railway Carriage and Iron Co.* v. *Riche*,[44] it was held that the rules applicable to the construction of powers conferred by Parliament upon statutory corporations were applicable also to the construction of the self-imposed limitations adopted by registered companies in their memoranda of association.[45] Lord Selborne described the inability of companies to make contracts [46]:

> " for objects and purposes foreign to, or inconsistent with, the memorandum of association . . . [as resting] on an original limitation and circumscription of their powers by the law, and for the purposes of their incorporation, [rather than] . . . upon some express or implied prohibition, making acts unlawful which otherwise they would have had a legal capacity to do."

Street summarises the effects of this doctrine upon the principle of separate legal entity in the following terms [47]:

> " A corporation is commonly styled a ' legal person,' but the appellation ' person ' is applicable to it only by analogy; and the analogy fails when it is thus clearly stated that this legal person is wanting in much that belongs to a natural person—that its course of existence is marked out from its birth; that it has been called into being for certain special purposes; that it has all the powers and capacities, and only those, which are expressly given it, or are absolutely requisite for the due carrying out of those purposes; and that all the obligations it affects to assume which do not arise from or out of the pursuit of such purposes, are null and void."

The recommendations of the Jenkins Committee on *ultra vires*, if adopted, will alter the present position by confining the operation

[40] *Sutton's Hospital Case* (1613) 10 Co.Rep. 1a at pp. 23a, 30b; and see *Baroness Wenlock* v. *River Dee Co.* (1887) 36 Ch.D. 674 at p. 685, *per* Bowen L.J.

[41] *Sutton's Hospital Case* (*supra*). This continues to be so for chartered companies. Cf. Lord Denning's description of the powers of chartered societies: *Institution of Mechanical Engineers* v. *Cane* [1961] A.C. 696, at p. 724–725.

[42] W. S. Holdsworth, *History of English Law*, Vol. VIII, pp. 215–217.

[43] *Eastern Counties Ry.* v. *Hawkes* (1855) 5 H.L.C. 331.

[44] (1875) L.R. 7 H.L. 653.

[45] Or which could, after the Companies (Memorandum of Association) Act 1890, s. 1, be added or substituted by special resolution.

[46] *Supra*, note 37.

[47] H. A. Street, *The Doctrine of Ultra Vires*, 1930, p. 4.

of the memorandum to the definition of the authority of those empowered to act for the company *vis-à-vis* its members.[48]

Independently of the doctrine of *ultra vires*, however, there are restrictions upon the extent of the company's legal capacity at common law which would operate, apparently, even if express objects clauses were not requisite. English law refuses to impute to companies those characteristics of natural persons which appertain to their human and social nature, and which may form the basis of a vast range of individual rights and duties. In particular, at law a company is recognised as having no physical attributes and no mind of its own. The most forthright statement of the company's limitations in this respect is that of Buckley L.J. in the Court of Appeal in *Continental Tyre and Rubber Co. (G.B.) Ltd.* v. *Daimler Co.*[49]:

> "The artificial legal person called the corporation has no physical existence. It exists only in contemplation of law. It has neither body, parts, nor passions. It cannot wear weapons nor serve in wars. It can be neither loyal nor disloyal. It cannot compass treason. It can be neither friend nor enemy. Apart from its corporators it can have neither thoughts, wishes, nor intentions, for it has no mind other than the minds of the corporators."

Subsequently this statement was approved by the House of Lords [50] and in part expressly adopted.[51] A company, Lord Parker observed,[52] "is not a natural person with mind or conscience." For Lord Shaw of Dunfermline [53]: "An incorporated company cannot with propriety have such terms [as allegiance and loyalty] applied to it as if it were a mind subject to emotions or passions or a sense of duty."

In *Lennard's Carrying Co.* v. *Asiatic Petroleum Co.*,[54] Viscount Haldane L.C. asserted that a company [55] "has no mind of its own any more than it has a body of its own." [56] It is not "a being who has eyes and ears," according to Lord Dunedin in *Houghton & Co.* v. *Nothard, Lowe and Wills*.[57] Again, in *Citizens Life Assurance Co.* v. *Brown*,[58] Lord Lindley rejected any suggestion that a state of mind could exist in, or should be imputed to, a company, as

[48] *Report of the Company Law Committee* (Cmnd. 1749, 1962), paras. 36–42. This report is referred to *infra* as the Jenkins Report.
[49] [1915] 1 K.B. 893 at p. 916.
[50] *Sub nom. Daimler Co. Ltd.* v. *Continental Tyre and Rubber Co. (G.B.) Ltd.* [1916] 2 A.C. 307.
[51] *Ibid.* at pp. 344–345, *per* Lord Parker.
[52] *Ibid.* at p. 345.
[53] *Ibid.* at p. 339.
[54] [1915] A.C. 705.
[55] *Ibid.* at p. 713.
[56] *Cf.* Lord Wright in *Soufracht (V/O)* v. *Van Udens Scheepvaart En Agentuur Maatschappij (N.V. Gebr.)* [1943] A.C. 203 at p. 235: ". . . a corporation differs from an individual in that the latter can, in theory at least, withdraw himself from the enemy country, whereas a corporation . . . depends for its functions and existence on the laws of the state under which it is incorporated."
[57] [1928] A.C. 1 at p. 14.
[58] [1904] A.C. 423.

it appeared to their Lordships[59] "to introduce metaphysical subtleties which are needless and fallacious."[60]

Blackstone's description of the effect upon the company's legal capacity of the exclusion of any attributes of mind or body was that[61]:

> "It can neither maintain, or be made defendant to, an action of battery or such like personal injuries: for a corporation can neither beat, nor be beaten, in its body politic. A corporation cannot commit treason, a felony, or other crime, in its corporate capacity . . . it is not liable to corporal penalties, nor to attainder, forfeiture, or corruption of blood. . . . Neither can it be committed to prison; for its existence being ideal, no man can apprehend or arrest it. And therefore also it cannot be outlawed; . . . Neither can a corporation be excommunicated. . . ."[62]

The recommendations of the Jenkins Committee to mitigate the effect of the *ultra vires* doctrine upon outsiders contracting in good faith with corporations were not apparently intended to alter in any way the basic common law limitations on the extent of corporate legal capacity.[63] Companies are no more likely in the future than in the past to be indictable for murder, capable of marriage, eligible to vote, or liable to National Service.[64]

[59] *Ibid.* at p. 426.

[60] Similarly it has been said that a company "has no mind and cannot have an intention": *R.* v. *Grubb* [1915] 2 K.B. 683 at p. 690; that it "is incapable of malice or of motive": *Abrath* v. *N. E. Ry.* (1886) 11 App.Cas 247 at p. 251; that it "cannot possibly have a competent knowledge in itself": *Pharmaceutical Society* v. *London and Provincial Supply Association* (1880) 5 App.Cas 857 at p. 870; and that it "has no soul to be saved or body to be kicked": *Stepney Corporation* v. *Osofsky* [1937] 3 All E.R. 289 at p. 291.

[61] Blackstone's *Commentaries*, 1775, Vol. 1, pp. 476–477.

[62] Pollock C.B. in *Metropolitan Saloon Omnibus Co.* v. *Hawkins* (1859) 4 H. & N. 87 stated that while a company could sue for libel "it could not sue in respect of an imputation of murder, or incest, or adultery, because it could not commit those crimes"; Lopes L.J. in *South Hetton Coal Co. Ltd.* v. *North Eastern News Association Ltd.* [1894] 1 Q.B. 133 said that a corporation could not sue in respect of a charge of corruption or of an assault "because a corporation cannot be guilty of corruption or of an assault"; in *R.* v. *Cory Bros. & Co. Ltd.* [1927] 1 K.B. 810 it was held that a company could not be indicted for manslaughter or for the offence of inflicting grievous bodily harm, and in *R.* v. *McDonnell* [1965] 3 W.L.R. 1188 that it could not be indicted with one director only for conspiracy because in such circumstances there could not be two or more independent minds.

[63] Jenkins Report, paras. 35–42.

[64] See further Gower, *op. cit.* p. 70, n. 57. On the authority of Lord Selborne L.C. a corporation certainly cannot be a pharmaceutical chemist, under the provisions of the Pharmacy Act: *Pharmaceutical Society* v. *London & Provincial Supply Association* (1880) 5 App.Cas. 857 at p. 868. Nor, according to Lord Hewart C.J., can it drive a motor-car: *Griffiths* v. *Studebaker Ltd.* [1924] 1 K.B. 102 at p. 105; while Avery J. has held that it cannot pass the final examination for solicitors, or apply to be admitted as a solicitor, or be so admitted, under the provisions of the Solicitors Act 1932: *Law Society* v. *United Service Bureau Ltd.* [1934] 1 K.B. 343 at p. 349. Lord Esher M.R. has noted that "a company as such cannot have indecent or vulgar manners": *South Hetton Coal Co. Ltd.* v. *North-Eastern News Association Ltd.* [1894] 1 Q.B. 133; and Lord Loreburn that "a company cannot eat or sleep . . .": *De Beers Consolidated Mines Ltd.* v. *Howe* [1906] A.C. 455 at p. 458.

It follows, therefore, that if a particular object or purpose is authorised in its memorandum, and lawful, a company may exercise the powers necessary to effect it. If, however, the purpose is illegal, or appropriate only for a natural person, the company will not be held to possess legal capacity. While these two categories are usually clear, borderline situations can occur and have done so most frequently in connection with corporate benevolence in the form of gifts for charitable, political or other purposes. As the company has no mind it cannot itself form a charitable intention and usually it is not expressly empowered to give away its property. It would have been logical for the law to have determined that such acts are not within the ambit of the company's legal capacity.[65] Instead, however, rules have been adopted under which, in general, a company may lawfully make gifts of its property where they can be justified as being reasonably incidental to its business, made bona fide, and for the benefit of the company.[66] To some extent these tests are questions of degree and where a proposed donation is more than incidental, such as where it is excessive in amount in relation to the company's profits or assets,[67] or where its primary purpose is the benefit of someone other than the company,[68] the courts have refused to hold that it is within the company's legal capacity.[69] Although often considered in terms of the duties of directors or

[65] Most companies are established for commercial purposes and the making of gifts must necessarily reduce their profits. *Cf.* Lord Simonds in *Smith's Potato Estates Ltd.* v. *Bolland* [1948] A.C. 508 at p. 527: " . . . money has been laid out for the purpose of reducing . . . trading profit, a purpose difficult to ascribe to a trader . . . "

[66] *Hutton* v. *West Cork Ry.* (1883) 23 Ch.D. 654; *Evans* v. *Brunner Mond & Co. Ltd.* [1921] 1 Ch. 359; *Re Lee, Behrens & Co. Ltd.* [1932] 2 Ch. 46; *Parke* v. *Daily News Ltd.* [1962] Ch. 927; *Re W. & M. Roith Ltd.* [1967] 1 All E.R. 427.

[67] As *e.g.*, in *Parke* v. *Daily News Ltd.* (*supra*).

[68] *Hutton* v. *West Cork Ry.* (*supra*); *Re Lee, Behrens & Co. Ltd.* (*supra*). *Parke* v. *Daily News Ltd.* (*supra*); *Re W. & M. Roith Ltd.* (*supra*). Analogous problems arise in tax law as to payments of an excess amount or sales at an undervalue by companies, which confer gratuitous benefits upon the recipient. Sales at an undervalue may be held to be outside the course of trade, *i.e.*, outside the purposes of the company: *Petrotim Securities Ltd.* v. *Ayres* [1964] 1 All E.R. 269 (C.A.); *Ridge Securities Ltd.* v. *I.R.C.* [1964] 1 All E.R. 275; and similarly with more complex transactions: *Bishop* v. *Finsbury Securities* [1966] 3 All E.R. 105; *Cooper* v. *Sandiford Investments Ltd.* [1967] 1 W.L.R. 1351. Payments which are so excessive as to be gratuitous dispositions may be held to be invalid: *Ridge Securities Ltd.* v. *I.R.C.* (*supra*); or the excess amount disallowed as a deduction for tax purposes: *Johnson Bros. & Co.* v. *I.R.C.* [1919] 2 K.B. 717; *Copeman* v. *William Flood & Sons Ltd.* [1941] 1 K.B. 202; *L. G. Berry Investments Ltd.* v. *Attwooll* [1964] 1 W.L.R. 698; and similarly if a payment is made otherwise than for the benefit of the company: *Dracup* v. *Dakin* (1967) 37 T.C. 377. The objects or purposes of the company are also relevant in determining whether a payment made for political purposes is within the course of its trade and deductible: *Boarland* v. *Kramat Pulai Ltd.* (1958) 35 T.C. 1; *Morgan* v. *Tate & Lyle Ltd.* [1955] A.C. 21; and *Joseph L. Thompson & Sons Ltd.* v. *Chamberlain* [1962] T.R. 327.

[69] The prima facie validity of donations for political and charitable purposes by companies has now been recognised by the legislature; Companies Act 1967, s. 19.

the application of *ultra vires* in its usual sense,[70] these issues essentially involve the *vires* of the company at common law.[71]

Unlawful acts may, of course, be carried out, ostensibly in the name of the company, by its officers and others. To minimise the need to resort to " metaphysical subtleties " the intended policy of the law, as expressed by the Patton Committee, in relation to directors, is that [72] " . . . the responsibility of directors for wrongful acts contemplated by the Companies Acts has been the responsibility of natural persons . . ." This common-sense approach applies generally. As far as possible where questions of illegality, physical action and *mens rea* arise in connection with company affairs the defendants will be the natural persons directly involved or responsible.[73]

The extent of the legal capacity of the company as a legal person is, therefore, very much more restricted than that of a natural person. It is limited by the doctrine of *ultra vires*, applied as a test of construction to the terms of the company's memorandum, and by a related common law principle of longer standing applied to determine the proper and lawful scope of the powers the company requires to give effect to its objects or purposes. As will be seen, exceptions are made in both categories, but such extensions of the company's capacity are greatly minimised, for example, when illegality is an issue, by dealing with the natural persons directly responsible for an act or omission on the part of the company as being personally liable for its consequences.

THE NATURE OF THE COMPANY'S LEGAL CAPACITY

To the extent that a company is properly authorised to act, what is the nature of the legal capacity which it may exercise? Is it " real," or " fictitious "? The terms " fictitious " and " artificial," as sometimes used to describe companies can only be understood by taking account of the twofold nature of the corporation. It consists both of an association of members, which may themselves be corporate bodies; and of an entity possessing independently of its membership the legal capacity to exercise proprietary, contractual and other powers. Clearly, as an association of members it has as real an existence as any other formally constituted society, and the above terms must therefore refer

[70] See K. W. Wedderburn, " *Ultra Vires* or Directors' Bona Fides? " (1967) 30 M.L.R. 566.

[71] *i.e.*, it is the legal capacity of the company which is in question: *cf. Kaye* v. *Croydon Tramways Co.* [1898] 1 Ch. 358 at p. 377, *per* Vaughan Williams L.J.

[72] *Company Law Amendment, Report of the Departmental Committee*, N.I. (Cmnd. 398, 1959), para. 17 and *ibid.* " A limited company has neither intelligence, discretion, a capacity to be punished nor a conscience ". The quotation above was cited with approval in the Jenkins Report, para. 84.

[73] See, *e.g.*, the offences under ss. 81, 155, 156, 158, 328, 329, 330, 331, 333; Companies Act 1967, s. 23; Income Tax Act 1952, s. 466; Trading with the Enemy Act 1939, s. 10; Land Commission Act 1967, s. 97.

primarily to the nature of its legal rights and obligations. It may be thought, for example, that when a company "owns" or deals in property, or enters into service, sale or other contracts, it does so not in its own right, as a natural person may do, but merely for or on behalf of its members and for their benefit. This being so, the company in reality exists simply as the agent of its members, or as a trustee for them, of property and contractual rights and obligations which in a true sense, taking into account "the realities of the situation," belong to those members.

It follows that on appropriate occasions the courts may or ought to disregard the fiction and deal instead with the company in its true nature as the agent or trustee of its members. To deny this proposition is not to assert that a company can never be the agent or trustee of its members or directors. It can, of course, act as an agent or as a trustee for any other person or persons, including its own members and directors. Whether or not it is acting in such capacity does not depend on the existence of an independent mind to control the company, as was shown in *Lee* v. *Lee's Air Farming Ltd.*,[74] but on whether the proprietary, contractual or other rights in question are, as a question of fact, being exercised on behalf of its members.[75]

While this is undoubted, it does not affect the wider proposition that, irrespective of true legal agency, a company may always be held to be the agent or trustee of its members in appropriate circumstances. In other words, in reality, or in substance, all the proprietary, contractual or other rights which may be in the apparent or "fictitious" ownership or possession of a company are in fact

[74] [1961] A.C. 12.

[75] This is well illustrated by *Henry Browne & Son Ltd.* v. *Smith* [1964] 2 Lloyd's Rep. 476, where the principal shareholder of a company was sued in respect of debt incurred in the name of the company. The plaintiff contended, unsuccessfully, that the shareholder and not the company entered into and was a party to the relevant contract or, alternatively, that the company acted merely as the shareholder's agent. Both issues were disposed of on the evidence as questions of fact. The decision exemplifies the rule expressed by Tomlin L.J. in *British Thomson-Houston Co. Ltd.* v. *Sterling Accessories Ltd.* [1924] 2 Ch. 33 at p. 38 in the following terms (italics added): "the agency of the company must be established *substantively* and cannot be inferred from the holding of director's office and the control of the shares alone. . . . Any other conclusion would have nullified the purpose for which the creation of limited companies was authorised by the Legislature." Examples of a company acting as an agent for its own shareholders are not uncommon: *e.g.*, *Southern* v. *Watson* [1940] 3 All E.R. 429 (C.A.), where a company acted as agent for a shareholder vendor on the sale of his business; *Rainham Chemical Works* v. *Belvedere* [1921] 2 A.C. 465, where an agreement provided that a newly formed company would take possession of land as agent for its vendor promoters; and *Canada Rice Mills Ltd.* v. *R.* [1939] 3 All E.R. 991, where a selling company under the same control as a manufacturing company was held to have acted as the agent of the latter. A company has no property in the shares of its members; it may therefore act as an agent for their sale: *Roberts* v. *Letter "T" Estates Ltd.* [1961] 3 W.L.R. 176 (P.C.). See also *Newmann* v. *I.R.C.* [1934] A.C. 215; *Cull* v. *I.R.C.* [1940] A.C. 51, which establish that the tax paid by companies is paid on their own profits, and not by them as agents for their members.

held or exercised by it on behalf of its shareholders. This proposition, if it represents the law, must be of fundamental importance and there is, it seems, considerable authority in its support. The cases which appear to establish that a company may be the agent of its members in this wide, general sense may be grouped under four heads:

(a) the case of " 100 per cent. ownership ";
(b) wholly owned subsidiary companies;
(c) subsidiary companies trading abroad; and
(d) other " miscellaneous " decisions.

Dicta in certain cases suggest that a company may be the agent of its members where one shareholder beneficially owns the entire share capital [76] including, for example, in *Pegler* v. *Craven* [77] and Devlin J.'s somewhat guarded comments that [78] " . . . the proposition might in loose talk pass muster in the case of the 100 per cent. shareholder." But it is a proposition which does not appear ever to have been applied to decide a case, and which is contrary to the decision in *Salomon* v. *Salomon & Co. Ltd.*,[79] where the six minority shareholders were all, to all intents and purposes, the mere nominees of Salomon, the majority shareholder. The House of Lords nevertheless specifically rejected the suggestion that the company was the agent of the latter. Further, the dicta to this effect in *Pegler* v. *Craven* [80] were subsequently discussed and rejected by a unanimous Court of Appeal in *Tunstall* v. *Steigmann*.[81]

Subsidiary companies constitute a special case within the preceding category, for by definition [82] they must always be controlled by another company. Again, however, the existence of complete control does not, of itself, establish that the subsidiary is the agent of its holding company. This is confirmed by *William Cory & Son Ltd.* v. *Dorman Long & Co. Ltd.*,[83] *Ebbw Vale U.D.C.* v. *South Wales Traffic Area Licensing Authority* [84] and *Merchandise Transport Ltd.* v. *British Transport Commission*.[85]

[76] *e.g.*, in *Gramophone & Typewriter Ltd.* v. *Stanley* [1908] 2 K.B. 89 at pp. 95–96, *per* Cozens-Hardy M.R., and *I.R.C.* v. *Sansom* [1921] 2 K.B. 492 at p. 503, *per* Lord Sterndale.

[77] [1952] 2 Q.B. 69 (C.A.).

[78] *Bank voor Handel en Scheepvaart N.V.* v. *Slatford* [1953] 1 Q.B. 248 at p. 276.

[79] [1897] A.C. 22.

[80] *Supra*.

[81] [1962] 2 Q.B. 593. The proposition that a company is the agent of its directors, unless substantiated by proper evidence, is equally unsound: *British Thomson-Houston Co. Ltd.* v. *Sterling Accessories Ltd.* [1924] 2 Ch. 33.

[82] s. 154.

[83] [1936] 2 All E.R. 886 (C.A.).

[84] [1951] 2 K.B. 366 (C.A.).

[85] [1962] 2 Q.B. 173. The fact that such companies may form one commercial unit may, however, be relevant in particular circumstances: see especially Devlin L.J. at pp. 202–203. *Firestone Tyre and Rubber Co.* v. *Llewellin* [1957] 1 W.L.R. 464 and certain early tax cases constitute an apparent exception, and are discussed further below. *Cf. Rodwell Securities* v. *I.R.C.* [1968] 1 All E.R. 257.

There is a separate line of authority concerning the tax liabilities of subsidiary and parent companies where one or other is carrying on business outside the United Kingdom. All but one of these cases was decided about the turn of the century and while they are obsolete with regard to the point of income tax law involved they have nevertheless been regarded as authority for the proposition under consideration.

An English company in *Bartholomay Brewing Co.* v. *Wyatt* [86] owned all but seven of the 10,000 shares of an American company carrying on a brewing business. It was held that the latter was not carrying on business for the former, and was liable to tax only on the income remitted as dividends to the United Kingdom. Shortly after, in the four *Apthorpe* cases,[87] the courts affirmed findings by the General Commissioners that businesses carried on by companies in the United States of America [88] were in fact carried on by their English parent companies, or were carried on by the American companies only " technically " as their own but in fact as agents for the English companies. The latter consequently were assessable to tax not on the amount of the profits remitted to the United Kingdom but on the whole of the profits earned in the United States.

Subsequently, on similar facts, the Court of Appeal reverted to the remittance basis for taxation in these circumstances. An English company in *Kodak Ltd.* v. *Clark* [89] held 98 per cent. of the shares of an American company which the Commissioners found was " for all purposes the agents of the English company." Both Phillimore J. at first instance and the Court of Appeal distinguished the *Apthorpe* cases on the ground that the American company which they had to consider had minority shareholders who were mostly " independent " persons.[90] They therefore held that the American company, although loosely described as an " agent," was a separate legal entity,[91] and that the English company was liable to tax only on profits remitted to the United Kingdom. Subsequently, again in *Gramophone & Typewriter Ltd.* v. *Stanley* [92] a German company was wholly owned by an English company but Walton J. at first instance [93] refused to adopt the reasoning of the *Apthorpe* cases and

[86] (1893) 3 T.C. 213.

[87] *Frank Jones Brewing Co.* v. *Apthorpe*, *infra*; *U.S. Brewing Co. Ltd.* v. *Apthorpe*, *infra*; *Apthorpe* v. *Peter Schoenhofen Brewing Co. Ltd.* (1899) 4 T.C. 41 (C.A.); *St. Louis Breweries* v. *Apthorpe* (1898) 4 T.C. 111.

[88] In *Frank Jones Brewing Co.* v. *Apthorpe* (1898) 4 T.C. 6, a U.S. company was not involved but part of the property in the U.S. was held by trustees for an English company, and in *U.S. Brewing Co. Ltd.* v. *Apthorpe* (1898) 4 T.C. 17, part of the American property only was held by a company.

[89] [1906] 1 K.B. 505 (C.A.).

[90] *Cf.* Scrutton L.J.'s comments in *I.R.C.* v. *Sansom* [1921] 2 K.B. 492 at pp. 509–510 on this point.

[91] Phillimore J. drew a distinction between carrying on a business (*i.e.*, as owners) and merely " controlling " it: " . . . one must not make the jump from control to 'carrying on business.'" His remarks following are quoted by Pennington, *op. cit.* at p. 49.

[92] [1906] 2 K.B. 89 (C.A.).

[93] [1906] 2 K.B. 856.

Kodak v. *Clark*. The foreign company was a separate and distinct legal entity in his view and not [94] " a mere alias, or a trustee, or an agent." This reasoning was upheld by the Court of Appeal and as a result therefore the English company was liable to tax only on the profits remitted.

It is no longer profitable to attempt to reconcile these conflicting decisions. The question of whether or not a subsidiary carries on its undertaking on behalf of its parent company was finally decided under this line of authority by *I.R.C.* v. *Sansom*,[95] where it was held that if a subsidiary is dealing with its own assets and business it is not the agent of its holding company. Scrutton L.J. observed in his judgment in the Court of Appeal that English companies had been purported to own all the assets of American companies in the earlier cases [96]: " although it was never quite clear how they did so." Once this issue is determined the only remaining question is whether or not the subsidiary company is within the tax jurisdiction and this is not a question of agency but of residence, as has been finally determined by the decision of the House of Lords in *Unit Construction Co. Ltd.* v. *Bullock*,[97] where it was held that three subsidiary companies in Kenya were in fact controlled by the board of directors of their holding company in England [98] and that, in consequence, each of the subsidiaries was resident, and liable to tax, in England, on the whole of its profits.[99]

[94] *Ibid.* at p. 872. Walton J. expressly excluded an agency relationship even if there were control of 100 per cent. of the company's capital.

[95] [1921] 2 K.B. 492 (C.A.).

[96] *Ibid.* at p. 508.

[97] [1960] A.C. 351.

[98] The management control test for residence purposes had been established by the decision of the House of Lords in *De Beers Consolidated Mines Ltd.* v. *Howe* [1906] A.C. 455.

[99] The converse situation to that under discussion arose in *Firestone Tyre & Rubber Co.* v. *Llewellin* [1957] 1 W.L.R. 464, in which an English company (" Brentford ") was the wholly owned subsidiary of an American company (" Akron "). The American company supplied distributors on the continent of Europe with goods manufactured in England, and was credited in the accounts of Brentford with the price received, less costs, plus 5 per cent. The Inland Revenue argued that the non-resident Akron was trading in the United Kingdom by means " of any factor, agent, receiver, branch, or manager." In the Court of Appeal ([1956] 1 W.L.R. 862) it was recognised that Brentford was trading in its own goods (*ibid.* at p. 871) and it might have been held, therefore, that Brentford was chargeable to tax on the total profits earned (the payment to Akron being simply an application or a disposition of those profits once earned), or, alternatively, that Brentford's rate of profit was fixed and that Akron was receiving a form of commission, fluctuating in amount, from Brentford as the receiver in England of its profits or gains in the United Kingdom. The Special Commissioners, however, had made a finding that Akron was carrying on a trade in the United Kingdom and that it was carrying it on through the agency of Brentford. The description of this relationship as " agency " was referred to by the Court of Appeal only in a loose descriptive sense and was regarded as being almost superfluous (or " academic ": *ibid.* at p. 872, *per* Birkett L.J.), while in the House of Lords it was ignored and the decision founded on the wider ground that an organisation or structure of trade based upon contractual powers equivalent in some respects at least to those of ownership falls within the charge to tax imposed under the above formulation.

Finally, there are two decisions of apparently general application not falling within any clear line of authority. In *Smith, Stone & Knight* v. *Birmingham Corporation* [1] Atkinson J. endeavoured to define circumstances in which a company might be the agent of its members in holding that a parent company could claim compensation for disturbance, on a compulsory requisition of premises, to the business of a wholly owned subsidiary, as its agent. Whether the company was the agent of its members was stated to be a question of fact in each case, determinable, it was suggested, by six criteria. The first related to the " ownership " of profits and the remaining five to various facets of control of and by management, " control " itself being divided into " capitalist control " and " functional control." [2] Atkinson J. purported to derive authority for his reasoning from certain dicta in *Gramophone & Typewriter Co. Ltd.* v. *Stanley* [3] and *I.R.C.* v. *Sansom* [4] and from two of the *Apthorpe* cases,[5] all of which have been considered above. In addition, he cited *San Paulo (Brazilian) Ry.* v. *Carter* [6] as support for the proposition that an English company could be taxed on the profits made by a subsidiary company carrying on business elsewhere as its agent. But this was not an accurate analysis of the facts in that case because the appellant company itself carried on business in Brazil and did not derive its income from a subsidiary there. None of the decisions referred to therefore appear to provide sound authority for the proposition Atkinson J. sought to establish.[7] The result is contrary to *Salomon's* case and other authority, being in particular completely inconsistent with the incisive reasoning of Devlin J. in *Bank voor Handel en Scheepvaart N.V.* v. *Slatford.*[8]

In *Re F.G. Films Ltd.*[9] an English company with a capital of £100 was the *de facto* subsidiary of a large American film company.[10] It purported to have made a film in India and applied to the Board of Trade to have it registered as a British film. The Board refused to register the film as " made " by an English company and on appeal Vaisey J. affirmed this ruling. The decision was simply that on a straightforward application of the statute to

[1] [1939] 4 All E.R. 116.
[2] The terms are those used by Professor Kahn-Freund: (1940) 3 M.L.R. 226.
[3] [1908] 2 K.B. 89 (C.A.).
[4] [1921] 2 K.B. 492 (C.A.).
[5] See note 87, above.
[6] [1896] A.C. 31.
[7] Similarly the exact nature of the " capitalist-functional " division of control is not readily apparent, and cannot be established from other cases before or since the *Smith, Stone & Knight* decision. The five criteria, apart from that relating to the ownership of profits, are all in fact merely descriptive of various facets of the powers of control commonly exercised by the board of directors, and the categorisation attempted seems to provide an illusory basis for distinctions of law.
[8] [1953] 1 Q.B. 248. *Cf.* Pennington's criticism of the decision on its facts: *op. cit.* p. 50.
[9] [1953] 1 W.L.R. 488.
[10] A controlling interest in its shareholding was held by the president of the U.S. company.

the facts the English company was not the "maker" of the film, but Vaisey J. remarked that the company's actions were those of a "nominee of and agent for an American company." [11] It seems clear, however, that the latter term was used descriptively and no attempt was made to define the relationship in question in any precise legal sense.

Isolated decisions which appear to establish that the company is a trustee of its property for its members have been equally unsatisfactory. Assets held on trust may be invested in a company or companies but the company is not a trustee of such property.[12] This is so even if the trustees of the property are also members of the company and directors, for the Court of Appeal in circumstances of this nature in *Butt* v. *Kelson* [13] has expressly affirmed the separation of the trust and the company. The plaintiff, a beneficiary under a family trust which held the majority of the share capital of a private company, was not, in Romer L.J.'s words,[14] "... entitled to call upon these directors [who were also the trustees of the settlement] to use their powers as directors as though they held those powers on trust for the plaintiff. ..." *The Abbey Malvern Wells Ltd.* v. *Ministry of Local Government and Planning* [15] only superficially suggests a contrary view. All the shares in the plaintiff company were vested in a charitable trust and, in addition, the management of the company was linked by the articles of association with the trustees of the settlement. Although certain land was owned by the company it could not be used in any manner for purposes outside the provisions of the trust deed. For this reason Danckwerts J. held that the land in question was "land an interest in which is held on charitable trusts." The company was not held to be a trustee of the land for its members but the decision turned on the ground that the status of all its members, as trustees, was relevant and material for the purposes of the statutory planning requirement.[16]

Transactions in the form of mutual trading between club members have a number of special legal aspects and in *Trebanog Working Men's Club and Institute Ltd.* v. *Macdonald* [17] the appellant was incorporated under the Industrial and Provident Societies Acts and had been convicted for purchasing and selling liquor to its club members without a justice's licence. The court affirmed that in these circumstances the members have a common interest in such property of the club and no sale had therefore taken place within the meaning of the relevant licensing legislation. It was stated also

[11] Although the English company was not the agent of the American company to make the film it was probably the agent of the latter to apply for registration.
[12] s. 117.
[13] [1952] Ch. 197.
[14] *Ibid.* at p. 207.
[15] [1951] Ch. 728.
[16] In effect it was held that the court is not prevented in such circumstances, by s. 117 or otherwise, from taking notice of trusts affecting shares.
[17] [1940] 1 K.B. 576.

that no valid distinction could be drawn between the various legal entities, an individual, a body of trustees, or a company formed for the purpose, who or which may be entrusted with the duty of holding the property on behalf of the members. This decision is unexceptional and the earlier case of *Wurzel* v. *Houghton Main Home Delivery Service Ltd.*,[18] where such a distinction was made, between an incorporated trustee and an unincorporated trustee, appears to be unsound.[19]

The only conclusion which can be drawn from this discussion, therefore, is that a company can never be the agent or trustee of its members unless, exceptionally, this relationship is "established substantively," *i.e.*, by clear evidence that it is acting on their behalf as, for example, that its shareholders do have legal or beneficial interests in property in its possession.[20] Lord Macnaghten in *Salomon* v. *Salomon & Co. Ltd.*,[21] stated this principle generally [22]:

> "The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them."

The House of Lords decided in effect that the liabilities in the form of debts as well as the assets of Salomon & Co. Ltd. *belonged* to that company and not to its shareholders. Any other view must involve what Lord Halsbury termed "a very singular contradiction" [23]: "Either the limited company was a legal entity or it was not. If

[18] [1937] 1 K.B. 380.

[19] It might be thought that the decision in the latter case was founded on a finding of fact that the incorporated society was itself carrying on a profit-making business of carrying goods for hire or reward, instead of being a mutual benefit society. This possible ground of distinction seems to fail, however, because the activities of both the incorporated and unincorporated society were apparently similar: *cf.* Gower, *op. cit.* pp. 204–205.

[20] In this discussion the words "property" and "assets" are used in a very wide sense to embrace, *inter alia*, rights of a contractual as well as of a strictly proprietary nature, *i.e.*, all rights of a commercial value. *Cf.* s. 208, which defines corporate "property" for the purpose of a scheme of arrangement or amalgamation to include "property, rights and powers of every description," while "liabilities" is defined to include duties. Similarly, in this context, the courts take a broad view of corporate "assets." Lord Davey, for example, in *Burland* v. *Earle* [1902] A.C. 83 at p. 93, spoke of the direct or indirect appropriation of "money, property or advantages which belong to the company," and Lord Russell of Killowen, in *H.B.M. Co. Ltd.* v. *Dominion Bank* [1937] 3 All E.R. 555 at p. 565, referred to the "legal entity and its actions, assets, rights and liabilities."

[21] [1897] A.C. 22.

[22] *Ibid.* at p. 51.

[23] *Ibid.* at p. 31 (italics added). The principle of separate legal entity had much earlier origins; see, *e.g.*, the discussion between J. A. Hornby and Professor Gower on *Houldsworth* v. *City of Glasgow Bank* (1880) 5 App.Cas. 317 in 19 M.L.R. 54 at pp. 61 and 185 and the authorities cited by K. W. Wedderburn [1957] C.L.J. 196, n. 16. *Salomon's* case was, however, critical in its development.

it was, the business *belonged* to it and not to Mr. Salomon. If it was not, there was no person and no thing. . . ."

The shareholders in any company cannot exercise any rights in respect of property owned by their company simply because they have no estate or interest in that property. Conversely, as established by *Salomon's* case,[31] the company has no estate or interest in the property of its members. This fundamental principle has often been restated. In *I.R.C.* v. *Sansom* [24] it was alleged that a company was the agent of its controlling shareholder for the purpose of avoiding liability to super-tax. The Court of Appeal rejected this contention, for, in Lord Sterndale M.R.'s words [25] " An agent cannot make a loan to a principal out of the principal's assets; it is not conceivable; it cannot be done." In the Court of Appeal's decision in *Firestone Tyre and Rubber Co.* v. *Llewellin* [26] Jenkins L.J. stated that a subsidiary company could not sell its property as the agent of its parent company, for [27] " it is a legal impossibility for a person to sell his own goods as agent for another." And in *Bank voor Handel en Scheepvaart N.V.* v. *Slatford* [28] Devlin J. described the proposition that [29] " property owned by a company belongs to its shareholders, or alternatively is held or managed by the company on behalf of its shareholders " as being " . . . beyond the reach of sustained argument. It seems to me to be contrary to all authority and principle." In Walton J.'s simple truism [30] " The property of the company is not the property of the shareholders; it is the property of the company." [31]

This principle is, or should be, applied in appropriate circumstances as a matter of course. In *Tunstall* v. *Steigmann* [32] a landlady opposed an application for a new lease on the ground that she intended to occupy the premises herself although her intention was that a company in which she beneficially owned all the shares should occupy it. The application was granted, Willmer L.J. observing [33] " . . . the landlord and her company are entirely separate entities. This is no matter of form; it is a matter of substance and reality." [34]

[24] [1921] 2 K.B. 492 (C.A.).
[25] *Ibid.* at p. 505.
[26] [1956] 1 W.L.R. 352.
[27] *Ibid.* at p. 703.
[28] [1953] 1 Q.B. 248.
[29] *Ibid.* at p. 269.
[30] *Gramophone & Typewriter Ltd.* v. *Stanley* [1906] 2 K.B. 856 at p. 869. *Cf. Re George Newman & Co.* [1895] 1 Ch. 674 at p. 685. (C.A.), *per* Lindley L.J.: " An incorporated company's assets are its property and not the property of the shareholders for the time being ".
[31] Pennington's description, *op. cit.* p. 50, of the apparent aberrations from this principle by the courts on rare occasions to the effect that agency and trusteeship concepts have been used as " a convenient legal fiction " to enable the court " to give decisions which it thinks just," and that the use of these terms on such occasions is " not a statement of [a] legal relationship at all," is well justified.
[32] [1962] 2 Q.B. 593; noted at (1962) 78 L.Q.R. 315.
[33] *Ibid.* at p. 605.
[34] Ormerod L.J. set out the contradiction involved in this case at length (*ibid.* at pp. 600–601) in terms that a shareholder cannot accept the advantages of the company's formation without being subject to the company's liabilities. *Cf.* the position of the third party: *Davies* v. *Hisby Brothers Ltd.* [1961] 1 W.L.R. 170; and *Whittam* v. *W. J. Daniel & Co. Ltd.* [1962] 1 Q.B. 271.

Similarly, *Lee* v. *Lee's Air Farming Ltd.*[35] was concerned with the separation of a company's contractual and other non-proprietary rights and liabilities from those of its members. Lee was governing director for life, and sole director of the respondent company, its controlling shareholder and its principal employee as a pilot. Following an accident causing his death, his widow brought a claim against the company and the question arose of whether or not in these circumstances Lee could be a " worker " for the purposes of the New Zealand Workers' Compensation Act 1922. The New Zealand Court of Appeal held that the existence of the two functions of sole effective manager and sole employee in one person was incompatible with the necessary element of control required to establish the relationship of master and servant.[36] The Privy Council reversed this decision, holding in effect that Lee's duties as governing director were owed to the company and constituted one of its assets. Likewise as an employee Lee's contract of employment was with the company and his services in this capacity were also part of its assets. Each contract was an independent and distinct transaction, entered into in separate capacities by Lee, and in each capacity full privity of contract subsisted. Lee, as manager, was not therefore " controlling " himself as an employee; as an employee he was being controlled by the company through its director. When the company's existence and rights were recognised in this way Lee's status as " a worker," within the meaning of the Act, was no different in law from that of other employees and his widow's claim was, accordingly, successful.

Lee v. *Lee's Air Farming Ltd.*[35] confirms *Salomon* v. *Salomon & Co. Ltd.* in making it clear that the number of shareholders and the nature of their interests in the company are irrelevant consideration with regard to any issues relating to, or derived from, the proper recognition and separation of the company as a legal entity. In his finely reasoned judgment in the *Bank voor Handel* case,[37] Devlin J. showed that this principle must be applied with universal effect. He stated that if a company may ever, on any occasion, be the agent, in the wide sense under consideration, of one or more of its shareholders who have full powers of control, it does not matter whether they have a 100, 99 or 51 per cent. holding, or even less in the case of *de facto* control, because[38] " If . . . the company holds its property on behalf of any number of shareholders who may at any time constitute the majority . . . [this] is the same thing as saying that it holds the property on behalf of any or all of them."

It follows that while companies as legal persons can only acquire and exercise a much narrower range of rights and powers than natural persons of full capacity, to the extent that they are so empowered, their legal capacity is identical in nature with that of

[35] [1961] A.C. 12.
[36] [1959] N.Z.L.R. 393.
[37] [1958] 1 Q.B. 248.
[38] *Ibid.* at p. 277.

such natural persons. In other words, the proprietary, contractual and other powers which a company may possess are in no sense derivative from or dependent upon its members. While there are exceptions to the principles of separate legal entity which limit and restrict the extent of corporate capacity there are, it is suggested, none to this principle, and the company, therefore, can never be a true agent or trustee for its members in respect of its own affairs, and its dealings in or use of assets of any nature which belong to it.[39]

An essential corollary

When individuals transfer assets to or invest money in a company they lose, as has been seen, all proprietary and other interests in that property. The rights and powers so relinquished are reformulated and reconstituted in another form of property created for this purpose. In return for their tangible or intangible assets shareholders receive the rights conferred upon them by their shares, and their proprietary rights are limited to their property in those shares. The shareholder, in Cohen L.J.'s description,[40] "has no property in, nor right to, any particular asset. He has only the right to have all the assets administered by the directors in accordance with the constitution of the company. . . ." [41] In Lord Porter's words [42]: ". . . in the case of land the owner possesses a tangible asset, whereas a shareholder has no direct share in the assets of the company. He has such rights as the memorandum and articles give him and nothing more." [43] This is an essential integral part of the concept of corporate legal entity because it makes possible the complete separation of the property and rights of the company from the property and rights of its members. It achieves this by a

[39] Subject perhaps to the "statutory hypothesis" discussed *infra*.

[40] *Hood-Barrs* v. *I.R.C.* [1946] 2 All E.R. 768 at p. 775.

[41] The point has been made in more picturesque language by A. A. Berle in *Power without Property*, 1959 at p. 68: "Ownership of a share of stock in the American Telephone and Telegraph Company gives the holder no right whatever to go off with a telephone pole."

[42] *Short* v. *Treasury Commissioners* [1948] 2 All E.R. 509 at p. 512.

[43] It has been expressly held that a shareholder cannot bring any action against an outsider in respect of leaseholds or chattels real owned by his company: *Pegler* v. *Craven* [1952] 2 Q.B. 69; and that the personal liabilities of shareholders must be disregarded in connection with the enforcement of choses in action owned by the company: *E.B.M. Co. Ltd.* v. *Dominion Bank* [1937] 3 All E.R. 555; nor can a shareholder be allowed to enforce or claim compensation personally on a chose in action owned by the company: *Roberts* v. *Coventry Corporation* [1947] 1 All E.R. 308; for the company must enforce its own rights; but *cf. Harold Elliott & H. Elliott (Builders) Ltd.* v. *Pierson* [1948] Ch. 452, where a controlling shareholder was joined with his company as plaintiff to enforce rights possessed by the latter. Similarly a shareholder has no insurable interest in respect of the company's property: *Macaura* v. *Northern Assurance Co.* [1925] A.C. 619; *General Accident Fire & Life Assurance Corp. Ltd.* v. *Midland Bank Ltd.* [1940] 2 K.B. 388. See further the definition of a share by Farwell J. in *Borland's Trustee* v. *Steel* [1901] 1 Ch. 279 at p. 288; approved by the House of Lords in *I.R.C.* v. *Crossman* [1967] A.C. 26; and the discussion by D. G. Rice, "The Legal Nature of a Share" (1957) 21 Conv.(N.S.) 383.

duplication of assets through the creation of shares as a new form of personal property. Through this duplication of interests in respect of the same assets "The corporation is not a mere aggregate of shareholders," [44] and "The undertaking is something different from the totality of the share-holdings." [45] The importance of the separate and independent existence of the proprietary and other rights of companies which is so made possible hardly needed the emphasis of Lord Russell of Killowen in *E.B.M. Co. Ltd.* v. *Dominion Bank* [46]:

> "Their Lordships . . . believe it to be of supreme importance that the distinction should be clearly marked, observed and maintained between an incorporated company's legal entity and its actions, assets, rights and liabilities on the one hand, and the individual shareholders and their actions, assets, rights and liabilities on the other hand."

The Procedural Capacities of the Company

The third basic problem to be resolved in establishing the concept of separate legal entity was that of the procedural capacity of the company. As stated earlier the company is more than an entity capable of the ownership of property. It is also an association of persons, all of whom individually possess their own standing at law. In consequence it became necessary to decide whether the company's capacity to act at law was to be dependent upon, or related to, that of the individuals who comprise it, as is the case, for example, with the trust, or whether it was to have separate and independent procedural powers. The development of two rules in the nineteenth century decided this issue in favour of the latter alternative. First, it was decided that the company's members have no capacity to act themselves, or in the company's name,[46a] on its behalf or for its benefit. Secondly, outsiders dealing with the company may rely on its capacity to act itself as a party to any transaction within its powers and need not inquire as to either the legal capacity of its members or the regularity of its internal affairs. These rules were confirmed by the well-known decisions in *Foss* v. *Harbottle* [47] and *Royal British Bank* v. *Turquand* [48] respectively. They have been considered very fully elsewhere [49] and only their relationship to and importance for the concept of separate legal entity need be noted here.

[44] *Flitcroft's Case* (1882) 21 Ch.D. 519 at p. 536, *per* Cotton L.J.
[45] Evershed L.J. in *Short* v. *Treasury Commissioners* [1948] 1 K.B. 116 at p. 122. *Cf. John Foster & Sons Ltd.* v. *I.R.C.* [1894] 1 Q.B. 516 at pp. 528 and 530.
[46] [1937] 3 All E.R. 555 at pp. 564–565.
[46a] *i.e.*, apart from the derivative action: see *e.g. Gower, op. cit.* pp. 581–586.
[47] (1843) 2 Ha. 461.
[48] (1856) 6 E. & B. 327.
[49] See, *e.g.*, Gower, *op. cit.* pp. 141–160 and pp. 526–538; Powell, *The Law of Agency*, 2nd ed., 1961, pp. 106–119; K. W. Wedderburn, "Shareholders' Control of Directors' Powers: a Judicial Innovation?" (1957) 20 M.L.R. 77; I. D. Campbell, "Contracts with Companies" (1959) 75 L.Q.R. 469; (1960) 76 L.Q.R. 115.

The decisions in *Foss* v. *Harbottle* and *Mozley* v. *Alston* [50] established that " the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is *prima facie* the company or association . . . itself." [51] The company and the company alone must act, and be acted against, to enter into and enforce its rights and obligations. The rule applies to actions by and against the company and *vis-à-vis* both outsiders and its own shareholders. It establishes another facet of the concept that a company has an independent and separate legal existence.[52]

Secondly, outsiders or third parties dealing with a company deal, in law, with that entity and not in any sense with its members. The rule laid down in *Royal British Bank* v. *Turquand* " mitigated " [53] the difficulties which might confront outsiders in transacting business with a company by providing that they may assume in their favour that the internal affairs of the company are in order.[54] Its effect is that the outsider contracts with one independent legal person, the company, and not with a complex association comprising numerous separate persons. Because of these rules third parties cannot deal with, or institute proceedings against, the members of the company, *qua* members, and usually have no need to do so, and members cannot act, as such, against third parties. The rights of both, in or against the company, are separate from and independent of each other and from the rights of the company itself.

THE CONCEPT OF SEPARATE LEGAL ENTITY

The principal effects of the formation of a company are twofold. First, its shareholders, and their transferees, become members of an association and are granted rights as such. Pre-eminent among these are, usually, powers of control in the widest sense of an entitlement to participate, by voting, in the management of the company through the appointment and removal of its directors, the distribution of profits and other decisions of the company in general meeting, and also by the power to enforce the company's regulations.[55] Secondly, and consequently, the members relinquish all

[50] (1847) 1 Ph. 790.

[51] *Edwards* v. *Halliwell* [1950] 2 All E.R. 1064 at p. 1066, *per* Jenkins L.J.

[52] As Pennington points out, *op. cit.* at p. 585, " This is a consequence of the company's separate legal personality, because when the company, as a corporate person, sustains a legal injury, it does not follow that all its members individually suffer a legal injury too, and unless they do, they have no grounds for suing." See also K. W. Wedderburn, *op. cit.* [1957] C.L.J. 194 at p. 196.

[53] The term used in the Jenkins Report, para. 41.

[54] Another aspect of the rule is that the courts will not interfere with the internal management of companies acting within their powers: see, *e.g.*, *Burland* v. *Earle* [1902] A.C. 83 at p. 93, *per* Lord Davey.

[55] See the recent discussion on *Re Richmond Gate Property Co. Ltd.* [1964] 3 All E.R. 936 by K. W. Wedderburn at (1965) 28 M.L.R. 347, and D. Marshall Evans, " *Quantum Meruit* and the Managing Director " (1966) 29 M.L.R. 606.

proprietary and other interests in the monetary or other consideration which they have given for their shares and which becomes wholly vested in the company. In effect, therefore, the members' rights of ownership of their assets are completely reconstituted and the powers conferred by membership substituted for powers of direct control.[56]

This result is achieved by applying to the company three basic principles or groups of principles. First, the legal capacity of the company is restricted or limited in its extent, both by the objects of the company and, more basically, by the common law, to activities which are both lawful and appropriate to the general scope of its purposes. Secondly, within the scope of its particular objects the company is accorded legal capacity for proprietary, contractual and other purposes which is of exactly the same nature as that possessed by natural persons of full capacity. This capacity is entirely separate from, and not derived from or related in any way to, the individuals who ultimately comprise the company's membership. Thirdly, the company itself is accorded full and independent procedural capacity both *vis-à-vis* its members and outsiders.

From the combination of these principles flow all the well-known practical aspects of separate legal entity. For example, due to its separate proprietary and other capacity the company may enjoy perpetual existence, its usefulness as an entity for accounting purposes is given a legal foundation, and the possibility is opened that its members may limit their liability.

Like the trust, the company enables the proprietary interests of natural persons to be associated and reconstituted in a manner which makes possible a real division of the ownership and control of property. Unlike the trust, however, the company may, to the extent it is empowered, itself possess full and independent capacity to exercise contractual, proprietary and other rights. Its combined attributes make it the ultimately sophisticated legal entity, for within its appropriate sphere of activity it can itself undertake all that an individual person might undertake, and act in so doing in its own name and on its own behalf.[56a]

THE EXCEPTIONS TO THE PRINCIPLES OF SEPARATE LEGAL ENTITY

It follows from what has been stated above that within the limits of their separate objects and the *vires* allowed at common law all companies possess identical legal capacity or legal capacity of the same nature. In each case this exists entirely separate from and otherwise totally unrelated to the status of the members, either

[56] It has been held in *I.R.C.* v. *Olive Mill Ltd.* [1963] 2 All E.R. 130, by Buckley J., that this reconstitution is terminated the moment that a company goes into liquidation, for at this point of time it ceases to be the beneficial owner of its property. See further [1960] B.T.R. 79; [1963] B.T.R. 312; and [1967] B.T.R. 1.

[56a] *Cf.* K. W. Wedderburn, "Corporate Personality and Social Policy: The Problem of the Quasi-Corporation" (1965) 28 M.L.R. 62.

severally or collectively. Nevertheless, both the legislature and the courts have found it necessary, or desirable, to make certain exceptions and to deal with some companies for certain purposes as if they were not entities separate from and independent of their members. These exceptions are of a varied nature but it would seem that an adequate attempt can be made to classify, and perhaps identify, them only if it is recognised that they are exceptions to either of the two basic principles underlying the concept of separate legal entity.

First, exceptions have been found to be necessary to the principles which delimit the scope of the company's legal capacity. The consequences of the concept that a company as a legal person has no mind or body or other physical attributes are that it cannot be liable for any tort which requires actual fault on the part of the tortfeasor or any crime which requires proof of *mens rea*, or any act requiring evidence of, for example, intent.[57] While on the whole the strict application of this principle operates satisfactorily there are cases where acts take place which are clearly within the scope of the commercial or other proper activities of a company but the nature of the act, and the scale or effect of damage or other resulting consequences, are such that justice cannot be done unless the company itself is held responsible. To achieve a measure of justice in these cases either the necessary elements of such acts or offences had to be modified when the defendant was a company, or alternatively the state of mind necessary to establish liability had to be attributed to the company. This second alternative has been adopted even though, as is often the case, it has the result that the exceptions so made abrogate at the same time both the doctrine of *ultra vires* and the common law limitations upon the extent of corporate powers.[58]

Exceptions have been made under this heading, under which companies have been held liable for tortious acts involving actual fault or privity,[59] for crimes requiring *mens rea*,[60] for fraud or

[57] The social and moral justification for the imputation of crime to corporations is open to debate: see Gerhard O. W. Mueller, "*Mens Rea* and the Corporation" (1957) 19 U.Pitt.L.Rev. 21; Glanville Williams, *Criminal Law* (The General Part), 2nd ed., 1961, pp. 862–865; P. C. Heerey, "Corporate Criminal Liability—a Reappraisal" (1962) 1 Tas.U.L.Rev. 677; H. Yaroshy, "Criminal Liability of Corporations" (1964) 10 McGill L.J. 142.

[58] *Cf. Salmond on Jurisprudence*, 12th ed., 1966, p. 315: "How, then, can an illegal act be imputed to a corporation? If illegal, it cannot be within the limits of lawful authority; and if not within these limits, it cannot be the act of the corporation."

[59] *Lennards' Carrying Co. Ltd.* v. *Asiatic Petroleum Co. Ltd.* [1915] A.C. 705 (company held liable for loss or damage caused by its "actual fault or privity"); *The Lady Gwendolen* [1965] 3 W.L.R. 91 (C.A.) (company held guilty of "actual fault").

[60] The leading cases are *D.P.P.* v. *Kent & Sussex Contractors Ltd.* [1944] K.B. 146; *R.* v. *I.C.R. Haulage Ltd.* [1944] K.B. 551; and *Moore* v. *Bresler Ltd.* [1944] 2 All E.R. 515.

improper conduct,[61] and they have been held to be able to form and possess a required intent for civil purposes.[62] These instances are nevertheless exceptional and the courts have indicated this clearly by leaving themselves a wide area of discretion in such cases, as the modern *locus classicus* in this area, the remarks of Denning L.J. in *H. L. Bolton (Engineering)* v. *T. J. Graham & Sons Ltd.*, show [63]:

> ". . . the intention of the company can be derived from the intention of its officers and agents. Whether their intention is the company's intention depends on the nature of the matter under consideration, the relative position of the officer or agent and the other relevant facts and circumstances of the case."

Secondly, and much more importantly, it has been found necessary to disregard in some cases the separate proprietary, contractual and other rights and obligations of certain companies primarily to effect distinctions between companies with different types of membership. In these cases the law ignores for particular purposes the reconstitution of the proprietary and other rights of shareholders in the company. Instead, for the purpose or purposes in question the members are, in effect, deemed to have some interest in the assets, rights or obligations of the company.[64] There were two possible means of reaching this result. One was to treat the company as the agent or trustee of its members. Although directly contrary to common law principles, Devlin L.J. has observed that [65] " the legislature can, if it chooses, demand that the courts ignore all the conceptions and principles which are at the root of company law," and to do so it may " forge a sledgehammer capable of cracking open the corporate skull." Parliament has apparently so far chosen this method in one instance only, to bring into charge to estate duty gifts made by a company of which the deceased at the time the gift

[61] The term used by the Privy Council in *Pioneer Laundry* v. *Minister of National Revenue* [1939] 4 All E.R. 264 at p. 269. Fraud and conduct which is not strictly dishonest, but nevertheless improper, or which is potentially possible as a means of avoiding the effect of a legal restriction, *e.g.*, as where a shareholder might do or attempt to do an act forbidden to his company, or vice versa, has always been recognised as an exception; see, *e.g.*, *Salomon* v. *Salomon & Co. Ltd.* [1897] A.C. 22 at pp. 52–53, *per* Lord Macnaghten; *Pioneer Laundry and Dry Cleaners Ltd.* v. *Minister of National Revenue* [1939] 4 All E.R. 254 at p. 259; *Gilford Motor Co.* v. *Horne* [1933] Ch. 935; *Re Bugle Press Ltd.* [1961] Ch. 270; *Jones* v. *Lipman* [1962] 1 W.L.R. 832; *Merchandise Transport Ltd.* v. *British Transport Commission* [1962] 2 Q.B. 173.

[62] *H. L. Bolton (Engineering) Co. Ltd.* v. *T. J. Graham & Sons Ltd.* [1957] 1 Q.B. 159 (C.A.); *Expresso Coffee Machine Co.* v. *Guardian Assurance Co.* [1958] 2 All E.R. 602, affd. [1959] 1 All E.R. 458; *Betty's Cafés* v. *Phillips Furnishing Stores* [1957] 2 All E.R. 228 *Cf.* also *Re Greater London Properties Ltd.* [1959] 1 All E.R. 728.

[63] [1957] 1 Q.B. 159 at p. 173 (C.A.).

[64] Exceptions once created may affect not only the right and obligations of the company but also those of shareholders in addition to the company, or further, they may affect particular transactions to which the company or its members may be party.

[65] *Bank voor Handel en Scheepvaart N.V.* v. *Slatford* [1953] 1 Q.B. 248 at p. 278.

was made had control."[66] In this case the company is deemed to be the trustees of its assets for its members and for any other person to whom liability has been incurred otherwise than wholly and exclusively for the purposes of its business. This, the so-called "statutory hypothesis," was considered by the House of Lords in *St. Aubyn* v. *Att.-Gen.* (*No.* 2),[67] where Lord Normand described it as a [68] "fictional mutation," Lord Simonds as [69] "a bewildering conception" and Lord Radcliffe as [70] "a clumsy device"; criticisms based primarily on the fact that the legal rights of shareholders are not analogous in any way to the interests of beneficiaries under a trust and as a result any realistic transmutation is impossible.[71]

While the legislature, in adopting this means of abrogating separate legal entity, is able to define the type of company to be affected, and to specify precisely the purpose for which such hypotheses will be applied, the courts are unable to legislate in this way to define the scope of exceptions. Lord Parker in the *Daimler Co.* case [72] in 1916 foresaw the problems very clearly:

> "It might possibly be contended that . . . [73] [an exception to separate legal entity should be made when the shareholders in question] amounted to (say) one-half, three-fifths or five-eighths of the whole, but how if the one-half, three-fifths or five eighths held only one-sixth, one-fifth or one-fourth of the shares? The Legislature might, but no Court could possibly lay down a hard and fast rule, and if no such rule were laid down, how could any one proposing to deal with the company

[66] Finance Act 1940, s. 56, and applied also in s. 44 (1B) (inserted by the Finance Act 1950, s. 46), and discussed by Wheatcroft, *The Taxation of Gifts and Settlements*, 3rd ed., 1958, pp. 47–48 and 141–147, and in greater detail in Dymond's *Death Duties*, 14th ed., 1965, Vol. 1, at pp. 208–218 and 498–504.

[67] [1952] A.C. 15. The "statutory hypothesis" was considered but not applied in this case.

[68] *Ibid.* at p. 42.

[69] *Ibid.* at p. 24. He went on to consider the problem involved, at p. 30: "It would perhaps be beyond the wit of the most skilful conveyancer to set out with any degree of accuracy the trusts which should correspond with the rights of the members of the company as that word is defined: for the legal relations in which the members stand to each other and to the company cannot be transmuted into those of trustee and *cestui que trust*."

[70] *Ibid.* at p. 51; and he elaborated further (*ibid.*): "it is impossible to say with any precision what are the equitable rights which ought to be thought of as analogous to the existing rights represented by shares and 'debentures.' It is particularly difficult in the case of shares, for the section throws no light on the extent to which one is supposed to retain or to discard the managerial powers to which the rights of ordinary and other shareholders are subject but which they may ultimately control."

[71] The reformulation of proprietary interests if a company were for certain purposes deemed to be the agent of its members would present similar problems.

[72] [1916] 2 A.C. 307 at pp. 346–347.

[73] The substituted wording here generalises the particular question before the court. The words replaced are: "it assumed an enemy character when its enemy shareholders . . ."

ascertain whether he was or was not proposing to deal with. . . [74] [a company which was a separate legal entity for the purpose in question or a company within an exception]."

A second method of abrogating the principle that the proprietary and other rights of the company are entirely separate from and independent of those of its shareholders has been developed by the legislature and avoids problems such as those foreseen by Lord Parker. It is a means which has been used increasingly since 1922,[75] and escapes all of the objections to the use of trust and agency concepts in this context. Instead of resorting to distinctions based on alleged agency, or on legal and beneficial interests in property, it utilises an entirely different incident of ownership—powers of control—as a means to separate companies into required categories. As types of control and the consequences of their existence can be precisely defined by the legislature when this method is used the law does not lose certainty. Rights or obligations can be created which apply with precision only to some companies and not to others.

The nature of this method of abrogating this basic principle of separate legal entity may be illustrated from tax law where it has been most widely invoked. For the purposes of taxation, and as a consequence of its separate legal existence,[76] "The taxpayer," in Lord Thankerton's words, "is the company, and not its shareholders." But certain companies may be dealt with for tax purposes as if their members owned or had an interest in their profits or other assets as is illustrated, for example, by Ungoed-Thomas J.'s recent description of the legislation relating to surtax directions [77]: "the general design of the relevant sections [is] to treat the income of the company as the income of its members."

Among the main exceptions in this category are the grouping of holding and subsidiary companies [78] by the legislature,[79] and to a much lesser extent by the courts,[80] and the separate

[74] The substituted wording replaces "the enemy."

[75] The "five person" control test introduced by s. 21 of the Finance Act 1922 appears to be the first use of this method.

[76] *Pioneer Laundry and Dry Cleaners Ltd.* v. *Minister of National Revenue* [1939] 4 All E.R. 264, at p. 269.

[77] *I.R.C.* v. *Coathew Investments Ltd.* [1965] 1 W.L.R. 588 at p. 590, and expressly approved by Willmer L.J. on appeal: *ibid.* at p. 594.

[78] Defined by s. 154. See also Jenkins Report, paras. 148–166.

[79] Among the special obligations which are imposed upon subsidiary companies due to the nature of their membership are requirements of ss. 27, 150–153, 161, 166 and The Companies Act 1967, ss. 5, 6, 14, 16–20.

[80] The three leading cases under this head, all decided by the House of Lords, are *H. Holdsworth (Wakefield) Ltd.* v. *Caddies* [1955] 1 W.L.R. 352, where it was held that a holding company and its subsidiaries were to be treated as one for the purposes of construction of a director's service agreement; *Regal (Hastings) Ltd.* v. *Gulliver* [1942] 1 All E.R. 378 (a case of *de facto* control of the "subsidiary" only), where the fiduciary duties of directors of a holding company were held to extend to their dealings with subsidiaries; and *Scottish Co-operative Wholesale Society Ltd.* v. *Meyer* [1959] A.C. 324, in which there was held to be an obligation upon a holding company to

treatment of companies controlled by a relatively small number of members or participators or under a common control for the purposes of income tax,[81] surtax,[82] capital gains tax [83] and corporation tax,[84] betterment levy,[85] and for exchange control [86] and enemy control legislation.[87] Where the relevant legislative provisions apply, the company is no longer regarded as a legal entity entirely separate and distinct from its shareholders. Instead for certain stipulated purposes the nature of its membership is taken into account and the company's rights and obligations altered in consequence.[88]

"deal fairly with its subsidiary"; and *cf. Merchandise Transport Ltd.* v. *British Transport Commission* [1962] 2 Q.B. 173. See also *Liverpool Corn Trade Association* v. *Hurst* [1936] 2 All E.R. 309; *Re Bulmer* [1936] 3 All E.R. 611; *Bird & Co. Ltd.* v. *Thos. Cook & Son Ltd.*, 156 L.T. 415; *The Roberta*, 58 Ll.L.R. 159; *Connors Bros. Ltd.* v. *Connors* [1940] 4 All E.R. 179; all of which are discussed by O. Kahn-Freund, "Some Reflections on Company Law Reform" (1944) 7 M.L.R. 54 at p. 55.

[81] Special provisions apply to a company in its dealings with a controlling person or company or a company which the latter controls, or with any company which it controls itself. These provisions include the substitution of market value for actual value for income tax purposes: I.T.A. 1952, s. 469; the substitution of market value for depreciation calculations by the Capital Allowances Act 1968, s. 78 and 7th Sched; and profits made by non-dealing companies as a result of transactions with associated dealing companies are deemed to be income: F.A. 1960, s. 25. See further the *British Tax Encyclopaedia*, Vol. 1, Chap. 12, especially paras. 1–1205 to 1–1211 inclusive.

[82] For income derived by a company prior to April 1966 a surtax direction could be made among any numbers if the company was under the control of five or fewer persons; I.T.A. 1952, ss. 245–264 inclusive. In respect of income derived by a company since that date a surtax appointment may be made of the income of a "close company" among its "participators" (both defined F.A. 1965, Sched. 18): F.A. 1965, s. 70.

[83] The allowable expenditure on shares in a close company is written down if the company transfers assets at an undervalue; F.A. 1965, Sched. 7, para. 18. Special provisions also apply to companies which are "connected persons" (defined *ibid.* para. 21), *e.g.*, on the disposal of assets, (*ibid.* para. 17), and to transfers of assets within groups: F.A. 1965, Sched. 18.

[84] For close companies income tax (and surtax) may be charged on the amount by which distributions fall below the required standard: F.A. 1965, ss. 77–78; restrictions are applied to the amount of directors' remuneration which is deductible for corporation tax: *ibid.* s. 74; loans to participants and their associates are chargeable to income tax: *ibid.* s. 75; income tax is chargeable on payments to participators and their associates for restrictive covenants: *ibid.* s. 76; and the meaning of "distribution" is extended: *ibid.* Sched. 11, para. 9.

[85] Dispositions between members of a group of companies and between "connected persons," as defined by the Land Commission Act 1967, Sched. 13, para. 5, may be disregarded for the purposes of liability to betterment levy: *ibid.* s. 78 and Sched. 18.

[86] Treasury control is applied to a wide range of transactions which may be entered into between English residents and "foreign companies" (as defined in the Exchange Control Act 1947, Sched. 2) which are controlled by persons resident in the United Kingdom: *ibid.* s. 30.

[87] In particular, trading with an enemy is prohibited. An enemy is defined to include a company controlled by a person who is an enemy: Trading with the Enemy Act 1939, s. 2 (1) (c). See also *Daimler Co. Ltd.* v. *Continental Tyre and Rubber Co. (G.B.) Ltd.* [1916] 2 A.C. 307; *Kuenigl* v. *Donnersmarck* [1955] 1 Q.B. 515.

[88] Not all definitions of company control are applied to abrogate the concept of separate legal entity by modifying the rights and obligation of certain companies due to the nature of their membership. In many cases the principal

Thirdly, exceptions have been made to the procedural rules discussed above. Again, these are very adequately dealt with elsewhere.[89]

Law, Theory and Terminology

The nature of the company as a separate legal entity, or legal person, has inspired a considerable volume of theoretical writing [90] but the various theories advanced, ostensibly to provide a basis for an understanding of the legal nature of the company, have never been adopted by the courts. It seems clear from the above discussion that the reason for this is that no hypothetical or metaphysical explanations are required because the company's existence is founded on legal principles which are as well established and as orthodox—if perhaps, taken together, more advanced—as those underlying the trust, partnership and other legal entities. Some of the descriptive or theoretical terms used with reference to companies tend, however, to be misleading. For example, it is inaccurate to describe companies as " fictitious " or " artificial " creations, for both their rights and powers upon incorporation and their existence as associations are as real and substantial as those of any natural person, or other corporate body.[90a] It is misleading also to refer to corporate " personality." " Personality " is commonly used to refer primarily to the essentially human attributes of natural persons which, as has been seen, are the characteristics essentially lacking in companies and it is at least preferable, therefore, to refer to companies as, instead, " entities " or " legal persons." [91] Phraseology such as " lifting the veil " or " piercing the veil," as noted above, has been widely employed in the U.S.A., and sometimes by English writers, to describe exceptions to this concept. The principles which have been suggested in the preceding discussion

or only effects of the existence of a defined type of control is upon the shareholders or participators themselves, *e.g.*, the application of the statutory hypothesis (discussed *supra*) affects primarily the valuation of the deceased's shareholder's shares. Similarly relief from capital gains tax is provided for an individual who disposes on retirement of his interest in a " family company ": F.A. 1965, s. 34. The test of " central management and control " is used to determine corporate residence: *Unit Construction Co.* v. *Bullock* [1960] A.C. 351. Definitions of the membership or control of a company as a whole are employed to give a particular status to certain general classes of companies, *e.g.*, the private company: s. 28 (1).

[89] See note 49, *supra*.

[90] See, *e.g.*, the works cited in note 28, *supra*, and the discussion by F. Hallis, *Corporate Personality*, 1930; M. Wolff, " On the Nature of Legal Persons " (1938) 54 L.Q.R. 494; A. Nekam, *The Personality Conception of the Legal Entity*, 1938; Salmond, *Jurisprudence*, 12th ed., 1966, Chap. 10; R. Pound, *Jurisprudence*, 1959, Vol. 4, Chap. 25; Hart, " Definition and Theory in Jurisprudence " (1954) 70 L.Q.R. 37, especially p. 49 *et seq.*; Kelsen, *General Theory of Law and State*, 1945, Part I, Chap. 9; L. C. Webb (Ed.), *Legal Personality and Political Pluralism*, 1958.

[90a] *Cf. Winfield on Tort*, 8th ed., pp. 728–731.

[91] Similarly it seems preferable to refer to the company in the singular rather than, as is often the case, in the plural, for it is both a single association and a single entity at law.

as constituting the essential elements of separate legal entity provide a means of identifying and categorising these exceptions, and of formulating rules applicable to each category. It seems preferable, therefore, to describe the exceptions by reference to the principles rather than in generalised and imprecise terms.

THE COMPANY AND THE FUTURE

There is no difference between the rights and powers which a company may lawfully acquire and exercise within its objects and the same rights and powers when possessed by any natural person—the former are as real and "non-artificial" as the latter. The company does differ from natural persons, however, in two major respects. First, the extent or range of the capacity with which it may be endowed is very much more restricted than that of an individual. Secondly, its ultimate motivation is not that of one person but of an association of persons, who usually act by majority rule, and who customarily delegate the exercise of their powers of control over many of the company's affairs to others.

Essentially, therefore, the company is simply a means by which the property and associated rights of numerous individuals may be amalgamated and reconstituted for their more efficient and effective utilisation. It is a means provided by the law to this end. It follows that the value of property transferred to and subsequently acquired by it is neither increased nor decreased by the act of incorporation. Nor, further, is the company capable by any means whatsoever of itself enjoying in any physical or real sense the benefits or advantages of ownership."[11]

Unfortunately a considerable degree of misunderstanding has become evident in recent times as to the nature of a company as a separate legal entity. Undoubtedly, as has been seen, for the business, commercial or other purposes for which it exists it is an independent and separate legal entity in every respect. But this has, or should have, no bearing whatsoever on the duties of companies compared with the duties of other persons, or on the obligations of company shareholders, as those who are ultimately entitled to the equity value of its undertaking. Nevertheless, there has been a tendency to deal with the company more and more as an end rather than as a means; or as being itself a participant in business instead of a mere business medium.

These misconceptions are apparent in a number of instances. For example, companies cannot themselves commit fraud, although they may be misused by individuals for fraudulent purposes, as, of course, may other legal entities. Therefore, new powers required to deal with increasing financial dishonesty might well have taken

[11] Although, as has been seen, it may own tangible and intangible property, the entire value is always ultimately attributable to or apportionable among its members, creditors and others with claims upon it.

the form of measures of general application. Instead, in the Companies Act 1967, provisions were enacted to deal only with fraud effected through the medium of companies.[93] One effect of this illogical limitation may be to ensure that trusts, partnerships and other media are increasingly used for such activities instead of companies, thereby avoiding the new powers and making them to this extent ineffective.

Secondly, there has been in recent years considerable discussion to the effect that the existing duties of companies, owed primarily but not exclusively to their shareholders and potential investors, ought to be extended, and new duties formulated, to their employees, the consumers of their products and services, and to the community at large.[94] But the duties of the company as an employer, as a producer of goods and services, and as an association of persons, are, and should be, no greater and no less than those of any other employer, producer or association. If, for example, employees or consumers ought to receive more or different information than is now made available to them, such requirements ought, again, to apply generally.

Thirdly, and of the most immediate importance, is the question of liability to tax. With regard to the incidence of taxation, as with its functions as a separate legal entity, the company is merely a commercial medium. Where companies are assessed in their own right to tax, therefore, the effect is simply to alter the burden of tax as between those interested in their profits, *i.e.*, the shareholders, and those interested in their prices, *i.e.*, the consumers of their products and services, for companies are not and can never be the final users of consumer goods and services. The advent of progressive rates of taxation had unintended consequences whereby companies could be used to minimise the tax liabilities of higher-rate individual taxpayers. In principle this was an unjustifiable anomaly but equally it is unjustifiable, and irrational, to subject income derived through companies to liability to tax in excess of that which would apply if any other form of ownership of the income-producing assets were adopted.[95]

The company, therefore, is neither a super nor a supra-person and should not be dealt with as if it were. The principal dangers of such misconceptions of its nature as a separate legal entity are that it may be over-regulated in terms of the extent of legal control to which it is made subject, and that it may be discriminated

[93] Companies Act 1967, ss. 109–118 and amendment of existing powers, *ibid.* ss. 35–42.

[94] It is possible that a further general review of company law may be instituted to consider this topic; see H.C.Deb., Vol. 741, col. 869.

[95] Corporation tax is open to criticism on this ground because it has the effect of charging tax on income derived through companies at a rate different from that charged on income from other sources, especially through the double charge on distributed company income, the different rate of tax on capital gains realised by companies, and the further charge on capital gains realised by companies when shareholders sell their shares.

against in comparison with other legal entities. These dangers are already evident and unless checked must inevitably lead to a decline in the value and usefulness of the company.

At the present time alleged defects of English law receive a great deal more attention than its merits. It is therefore easy to overlook real achievements, among which one of the foremost is the concept of the company as a separate legal entity. This provides the community with an exceptionally valuable form of association and ownership. It offers a medium in which expertise in management and the use of assets can be combined with individual ownership and control. For the investor, the ordinary share, which results from the reconstitution or reformulation of property rights in the company, is clearly one of the most convenient and flexible forms of property ever devised. The existing and potential benefits to individual investors, company management and the community as a whole through the use of this means of facilitating business and commercial transactions can hardly be overestimated.[96] The evolution of the company as a separate legal entity is one of the law's greatest contributions to business and commerce.

B. C. Hunt has written of [97] " that brilliant intellectual achievement of the Roman lawyers, the juristic person, a subject of rights and liabilities as is a natural person." Although so anticipated, to some extent, the achievement is no less remarkable in English law where a corporate legal entity has been evolved which has shown itself to be fully adequate to meet the vastly greater and more complex needs of modern times and, so far, capable of adaptation and development to maintain its usefulness. It will be an incalculable loss if, through misunderstandings and misconceptions, the clock is turned back and commerce is driven into the use of other, less sophisticated and less advantageous business media.

MURRAY A. PICKERING.*

[96] It has been estimated, for example, that approximately 40 per cent. of the value of all physical assets in the United Kingdom at the end of 1961 was vested in companies: Jack Revell, "The Wealth of the Nation," *Moorgate and Wall Street*, Spring 1966, p. 67. The figure quoted is the total share of physical assets of the non-financial companies and finance sectors shown in Table 8 (*ibid.* p. 72). The basis of these calculations and necessary qualifications are set out in detail in the article.

[97] *The Development of the Business Corporation in England 1800–1867*, 1936, p. 8.

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LOCUS STANDI IN ACTIONS FOR A DECLARATION

By Order 15, r. 16, of the Rules of the Supreme Court 1965, a single judge of any Division of the High Court is empowered to "Make binding declarations of right whether or not any consequential relief is or could be claimed."

As has been made clear by several writers,[1] the declaration is a remedy which has in administrative law for some time been enjoying an increasing popularity. On the other hand, it is a discretionary remedy which cannot be demanded as of right and it will, indeed, be refused if the court considers that some other remedy (in particular, certiorari) is more appropriate.[2] As Dr. Yardley has shown in relation to proceedings for certiorari, prohibition and mandamus,[3] the court's discretion in granting one of these remedies may be exercised in such a manner as to regulate the nature of the interest that must be possessed by the plaintiff in order to justify proceedings being taken by him; if the court considers an adequate interest to be lacking, its discretion will be exercised so as to refuse the plaintiff a remedy although it might grant the same remedy on the same facts to a different plaintiff who is able to show an adequate interest.[4]

Like most other systems of law, English law does not favour the granting of an *actio popularis*, and therefore, as in the case of other remedies, a declaration will be refused unless the plaintiff can show he has a sufficient interest. The problem may resolve itself, however, in practice into how close, how serious or how personal must be this interest. This question is not made any easier of solution by the existence of the competing remedy of the relator action, where the Attorney-General at the relation of some person "interested" asks for an injunction or possibly only a declaration "in the public interest." Here it is a matter for the Attorney's own discretion as to whether he will lend his name to the proceedings,

[1] See Lord Denning in his Hamlyn Lectures, *Freedom under the Law* (1949) at p. 126, and articles by G. J. Borrie at 18 M.L.R. 188 and by I. Zamir at [1958] P.L. 341, and also the latter author's book *The Declaratory Judgment* (1962).

[2] See *Punton* v. *Ministry of Pensions and National Insurance* (*No.* 2) [1964] 1 All E.R. 448.

[3] Two articles by this writer, at (1955) 71 L.Q.R. 388 and (1957) 73 L.Q.R. 534.

[4] Or *locus standi*; in America the same idea is known as "standing," and in French *droit administratif* as "*intérêt pour agir*," or "*intérêt*," simpliciter; in Belgian *droit administratif*, it is said that "*l'intérêt droit être personnel*" (Most, *Précis de Droit Administratif Belge*, s. 523).

and this discretion will not be controlled by the court: as was said by Farwell L.J.,[5]

> " It is for the Attorney-General to determine whether he should commence litigation, but it is for the court to determine what the result of that litigation shall be. . . . That is to say, the court cannot say ' you ought never to have instituted these proceedings ': it must listen to his application, and then adjudicate whether there should be an injunction granted or not."

Care should be taken therefore to exclude relator actions from consideration of the extent of the plaintiff's interest in cases where he is asking for a declaration without the assistance of the Attorney-General.

A further complicating factor is the existence of the alternative remedy of an injunction; in many of the leading cases concerning declarations an injunction is asked for in addition to a declaration. This complication does not, however, seem to be of the first importance, as the courts appear to take precisely the same attitude to the question of the *locus standi* of the plaintiff when an injunction is asked for as they do when the remedy sought is a declaration. Indeed, the *locus classicus* of comments on the standing of the plaintiff in an action challenging an act of a statutory body on the ground of *ultra vires* is an injunction case. In *Ware* v. *Regents Canal Co.*[6] Lord Chelmsford L.C. said (at p. 228):

> " Where there has been an excess of the powers given by an Act of Parliament but no injury has been occasioned to any individual, or is imminent and of irreparable consequences, I apprehend that no one but the Attorney-General on behalf of the public has a right to apply to this court to check the exorbitance of the party in the exercise of the powers confided to him by the legislature. If an individual has sustained no damage, and there is no reason to apprehend that he will sustain damage, notwithstanding his being nearer to the possible cause of injury than the rest of the public, he has no peculiar position or claim to entitle him to become a redresser of a public grievance or to complain of the disregard of the provisions of an Act of Parliament."

The action for a declaration asks for a " declaration of right "; therefore one would expect the court to require the plaintiff to be a party to the " right," or for his legal " rights " to be affected or to be in jeopardy as a consequence of the administrative or other decision which it is sought to attack in the action. Thus, in a straightforward case arising out of contract [7] the plaintiff in such an action will normally be a party to the contract or a third party claiming to be entitled to enforce the contract, or possibly to be

[5] In *Att.-Gen.* v. *Birmingham, Tame and Rea District Drainage Board* [1910] 1 Ch. 48 at p. 61; cited in *Att.-Gen.* v. *Harris* [1960] 3 All E.R. 207 at p. 211, both of which were injunction cases.

[6] (1858) 3 De G. & J. 212.

[7] As in *Foley* v. *Classique Coaches Ltd.* [1934] 2 K.B. 1.

exempt from its provisions.[8] Declarations are not popular remedies in the law of tort, for obvious reasons, but the plaintiff may seek a declaration only, in a case where some question of title is in issue [9]; here again the plaintiff clearly has property "rights" to justify his action. In property law and the law of trusts, the declaration is a much more popular remedy, but even here the jurisdiction is confined to declaring the rights and duties of the plaintiff and the defendant *inter se*.[10] There must always be a real issue in dispute,[11] that issue must be "justiciable,"[12] and there must always be a defendant "presently existing who has a true interest to oppose the declaration sought"[13]; or, in other words, there must be "a proper contradictor."[14]

Sometimes it is said that the plaintiff's "private rights" must be affected, as in a case where a declaration was refused for want of *locus standi*, because (said Lord Westbury, L.C.)[15] "I cannot see any private right which this incorporated Stockport company has in the matter. I do not see how the overleaping of their limits by the Manchester Corporation [this was a case where the plaintiff alleged that the corporation were acting *ultra vires*] inflicts any amount of private injury upon the plaintiffs so as to entitle them to seek redress in a court of justice." In *L.P.T.B.* v. *Moscrop*,[16] an employee of the L.P.T.B., who was a member of the Y trade union, was not allowed to bring an action for a declaration to the effect that a condition in his terms of employment that he might be represented in cases of discipline by an official of the X trade union was unlawful because he was not also allowed to be represented by an official of his own trade union. Certainly the case turned on a construction of the Trade Disputes and Trade Unions Act 1927, but it is clear that their Lordships in the House of Lords were of the opinion that the plaintiff had insufficient interest to support his action:

[8] As in *L.P.T.B.* v. *Moscrop* [1942] 1 All E.R. 97; and see below.

[9] See, for example, the unusual case of *London* v. *Ryder (No. 2)* [1956] Ch. 428.

[10] A declaration "of right" cannot be binding on the public at large unless the Attorney-General is joined as plaintiff (see, for example, *Taff Vale Ry.* v. *Pontypridd U.D.C.* (1906) 69 J.P. 361, where a declaration to the effect that the defendant had rights to lay pipes in a certain way because it was a public road was said to be not binding on the public), nor will such proceedings be binding on other persons (the declaration in *Dyson* v. *Att.-Gen.* [1911] 1 K.B. 410, to the effect that a resolution of the House of Commons was insufficient justification for the levying of income tax on the plaintiff, would not have prevented subsequent potential plaintiffs in the same situation from bringing similar actions).

[11] The court will not answer hypothetical questions: *Re Barnato, Joel* v. *Sauges* [1949] 1 All E.R. 515; *Re Croydon Development Plans 1954 and 1959* [1967] 2 All E.R. 589.

[12] *Cox* v. *Green* [1966] 1 All E.R. 268.

[13] *Per* Lord Dunedin (applying Scots law) in *Russian Commercial and Industrial Bank* v. *British Bank for Foreign Trade* [1921] 2 A.C. 438 at p. 448.

[14] *Ibid.*

[15] In *Stockport District Waterworks Co.* v. *Manchester Corporation* (1868) 7 L.T. 545 at p. 548.

[16] [1942] 1 All E.R. 97.

> " what special interest has the plaintiff to enable him to bring this action? We are not here concerned with anything but his civil right, if any, under the section. I think it is plain that there has been no interference with any private right of his, nor has he suffered special damage peculiar to himself from the alleged breach of the general prohibition. . . . " [17]

Cases where a declaration is sought against—or on behalf of—some local government or other public agency are regulated, it would seem, by the same principles as those applicable to a private law situation; it is still true that, even if we now have the beginnings of a " system " of administrative law,[18] our public law is part of the general fabric of the ordinary law and is not a separate body of " jurisprudence," as in France. In some cases in the public law sector, the *locus standi* of the plaintiff seems to approximate to that expression of no very precise meaning beloved of the draftsman when granting a statutory right of appeal, namely, a " person aggrieved." In the Privy Council case of *Att.-Gen. of Gambia* v. *N'Jie*,[19] Lord Denning said [20]: " The words ' person aggrieved ' are of wide import and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busybody who is interfering in things which do not concern him; but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests." Although, as we have seen, the words " person aggrieved " do not appear in the rule giving the High Court jurisdiction to grant a declaration, that jurisdiction is something very like the explanation given to those words by Lord Denning, and the courts will expect of the plaintiff who comes to ask for a declaration much the same qualifying interest. Thus, the landowner who wanted to know whether the operations he was carrying out on his land amounted to development for which planning permission would be required was allowed to ask for a declaration, even where some alternative means of obtaining an answer to the same question was provided by the statute,[21] and so was a former police officer who had resigned but was then dismissed in accordance with a procedure which he alleged (and was able to establish) did not observe the principles of natural justice.[22]

On the other hand, it was doubted whether a would-be plaintiff who was seeking to impeach the validity of a planning permission in respect of a particular parcel of land had a sufficient interest in the subject-matter when it transpired that he lived some ten miles away and had no greater or closer interest in the problem than the fact that he was a user of the highway which passed the

[17] *Ibid.* at p. 104, *per* Viscount Maugham.
[18] See *per* Lord Reid in *Ridge* v. *Baldwin* [1963] 2 All E.R. 66 at p. 76.
[19] [1961] 2 All E.R. 504.
[20] At p. 511.
[21] *Pyx Granite Co. Ltd.* v. *Minister of Housing and Local Government* [1959] 3 All E.R. 1.
[22] *Cooper* v. *Wilson* [1937] 2 All E.R. 726.

site.[25] Again, in *Gregory* v. *London Borough of Camden*,[26] the plaintiff landowner was held to have insufficient status to seek a declaration to the effect that a planning permission authorising development on land at the back of his garden was *ultra vires* the local planning authority. In this case Paull J. differed from the earlier case of *R.* v. *Hendon R.D.C., ex p. Chorley*,[27] where the facts (so far as this issue is concerned) were very similar, but in the *Hendon* case the remedy sought was a certiorari, and the basis on which the court was asked to intervene was very different. So far as *Gregory* is inconsistent with *Hendon*, it is submitted that *Gregory* is more consonant with principle and is likely to be followed.[28] In a recent case from Ceylon,[29] the Privy Council held that the plaintiff, who had been a mayor of a town whose charter of incorporation had been wrongly (as it was held) revoked, had insufficient interest to obtain a declaration to that effect, although it was an incidental consequence of the revocation that he had lost his status as mayor: "The appellant was no doubt mayor at the time of its dissolution, but that does not give him the right to complain independently of the council. He must show that he is representing the council or suing on its behalf or that by reason of certain circumstances . . . the council cannot be the plaintiff." [30]

Where the plaintiff is one of a large number of persons affected by the decisions, this will not affect his status; thus, a taxpayer required to pay a specific tax will be able to sue as he, in common with millions of others, will be affected and has an "interest." [31] Also, a ratepayer, because of his liability to pay rates, is apparently entitled to impeach the validity of a decision of the local authority that will have an effect (however slight) on the rates he will have to pay. This seems to follow from *Prescott* v. *Birmingham Corporation*,[32] where a ratepayer successfully obtained a declaration to the effect that the local authority were acting *ultra vires* in seeking to allow old age pensioners to travel free on public transport in the city. The effect of this decision on the amount of the rates which Mr. Prescott would have had to pay was obviously very small,

[25] *R.* v. *Bradford-on-Avon R.D.C.* [1964] 2 All E.R. 492, *per* Widgery J. at p. 494 (a certiorari case).
[26] [1966] 2 All E.R. 196.
[27] [1963] 2 K.B. 696.
[28] The decision in *Gregory* is perhaps weakened on the *locus standi* point, because it seems clear that the plaintiff could not have succeeded on the substance of his case: see, for example, *Simpson* v. *Corporation of Edinburgh*, 1961 S.L.T. 17.
[29] *Durayappah* v. *Fernando* [1967] 2 All E.R. 152. The flaw in the Minister's decision dissolving the corporation in this case was a failure to observe the principle of natural justice of *audi alteram partem*, and therefore, as their Lordships held, the decision was not a nullity but only voidable. As in *Ridge* v. *Baldwin* (*supra*), a voidable decision can be impeached only by the person directly affected; but apparently (although the decision did not establish the point) a lower "quality" of interest would have been sufficient to enable a plaintiff to impeach a decision which was a nullity *ab initio*.
[30] *Per* Lord Upjohn at p. 160.
[31] *Dyson* v. *Att.-Gen.* [1911] 1 K.B. 410.
[32] [1964] 3 All E.R. 698.

but the question of his *locus standi* to bring the action does not seem to have been raised, nor is it referred to in the judgments at first instance or in the Court of Appeal, nor in the report of the arguments of learned counsel. Many of the earlier cases on *vires* affecting local authorities have been relator actions with the Attorney-General as plaintiff [33] (see above), and the " declaration " *locus standi* of the ratepayer-plaintiff could not then have been in issue. In New Zealand, however,[34] a declaration was refused to a ratepayer who claimed that his local authority were acting *ultra vires* in adding sodium fluoride to the public water supply for the purpose of reducing the incidence of dental caries among local residents; it was held that the plaintiff had not sustained any interference with any private right of his, and that therefore he could not sue except in a relator action with the assistance of the Attorney-General.[35]

Of course a ratepayer has *locus standi* to question the amount of rates for which he personally may be liable,[36] but (in spite of *Prescott* v. *Birmingham Corporation*) it is unlikely that the English courts would ever accept as sufficient some interests that have been accepted by courts in other jurisdictions in similar circumstances. Thus, in France, a firm of travel agents were allowed to challenge a local by-law subjecting excursion charabancs to the same restrictions as taxicabs,[37] and a " users' association " was permitted to question the validity of an order withdrawing a tramway service from a particular district of Bordeaux.[38] In the United States the power of the federal courts to grant a declaration stems from the jurisdiction given to the courts in any " case or controversy " by Article 8 of the Constitution, and in administrative cases the standing of the plaintiff depends on section 10 (*a*) of the Administrative Procedure Act 1946; " any person suffering legal wrong . . . shall be entitled to judicial review thereof." [41]

[33] *Att.-Gen.* v. *Fulham Corporation* [1921] 1 Ch. 440; *Att.-Gen.* v. *Smethwick Corporation* [1932] 1 Ch. 562; *Att.-Gen.* v. *Crayford U.D.C.* [1962] 2 All E.R. 147; in each of the first two named cases the relators were ratepayers. Other cases involving questions of *vires* have been brought by way of appeal from a decision of a district auditor under s. 129 of the Local Government Act 1933, or by appeal against an order for payment made by a local authority under s. 187 (3) of the same Act (see, *e.g.*, *Grainger* v. *Liverpool Corporation* [1954] 1 All E.R. 383).

[34] *Collins* v. *Lower Hutt City Corporation* [1961] N.Z.L.R. 250.

[35] A hint which was promptly taken by associates of the plaintiff, although they were eventually unsuccessful on the merits in the Privy Council: *Att.-Gen. for New Zealand* v. *Lower Hutt City Corporation* [1964] 3 All E.R. 179.

[36] *Waterson* v. *Hendon B.C.* [1959] 2 All E.R. 760.

[37] *Cook et Fils*, C.E., May 5, 1899; see Brown and Garner, *French Administrative Law* (1967) at p. 81.

[38] *Syndicat des Propriétaires du Quartier Croix-de-Seguey-Tivoli*, *C.E.*, December 21, 1906.

[41] In American state administrative law, it is provided in the Revised Model State Act, s. 15, that " a person who is aggrieved by a final decision in a contested case is entitled to judicial review," and s. 2 of the Uniform Declaratory Judgments Act (which does not specifically refer to administrative rules, but has been so applied in some jurisdictions) provides that " *any person interested*

It is a matter for argument as to whether in the federal jurisdiction an adverse effect in fact is enough to give standing, or whether there must be a deprivation of a legal right [43]; a possible economic injury as a consequence of competition from a broadcasting station is apparently sufficient to give a rival radio station standing to question a decision of the Federal Communications Commission to grant a licence to the first-named station.[44] It seems, on the other hand, to be established that a plaintiff will not normally be allowed to institute legal proceedings in order to protect the rights of another.[44] In a more recent case, however, a circuit court of appeals held that representatives of the listening public had sufficient standing to intervene as parties in a proceeding held by the Federal Communications Commission, and to contest the renewal of a licence to operate a television station.[45] This may be contrasted with the Canadian case of *Cowan* v. *Canadian Broadcasting Corporation*,[46] in which the plaintiff, a Toronto resident, claimed a declaration to the effect that the C.B.C. were acting *ultra vires* in transmitting French language programmes only, to the exclusion of programmes in the English language (which had previously been transmitted), from their broadcasting station in Toronto. In this case the Ontario Court of Appeal, relying principally on *Ware* v. *Regents Canal Co.*[47] held that the plaintiff had insufficient *locus standi*; " a plaintiff, in attempting to restrain, control or confine within proper limits the act of a public or quasi-public [*sic* !] body which affects the public generally, is an outsider unless he has sustained special damage or ' can show that he has some special interest, private interest, or sufficient interest.' " [48]

The Canadian approach, rather than that of the American federal courts, is the one most likely to be acceptable to English courts; thus, in *Thorne* v. *B.B.C.*[49] the statement of claim was struck out as disclosing no cause of action, where a plaintiff sought

under a deed, will, written contract or other writings constituting a contract, or *whose rights, status or other legal relations are affected* by a statute, municipal ordinance, contract or franchise, *may have determined any question* of construction or validity arising under the instrument, statute, ordinance, contract or franchise *and obtain a declaration of rights, status or other legal relations* thereunder " (italics are the present author's): see *State Administrative Law* by Frank E. Cooper, 1965, p. 246.

[43] See K. C. Davies, *Administrative Law Treatise*, § 22.01.

[44] *F.C.C.* v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940).

[44] *Tileston* v. *Ullman*, 318 U.S. 44 (1943), where a physician was held to have insufficient standing to challenge the validity of a state prohibition on the giving of advice about the use of contraceptives, although he alleged the prohibition would affect adversely the health of some of his patients. This case differed from the earlier decision in *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), but is now more generally accepted in the federal jurisdiction.

[45] The appellants argued that the licence renewal should be refused, because (it was alleged) the station provided a disproportionate amount of commercials and entertainment, and did not give a fair presentation of controversial issues, particularly on racial matters: see *Office of Communication of United Church of Christ* v. *F.C.C.*, 359 F. 2d 994 (1966), noted in *Annual Survey of American Law*, 1966, Part I, at p. 29.

[46] (1966) 56 D.L.R. (2d) 678.

[47] *Supra*.

[48] *Per* Schroeder J.A. at p. 680.

[49] [1967] 1 W.L.R. 1104; [1967] 2 All E.R. 1225, C.A.

an injunction against the B.B.C., alleging that they had broadcast racial abuse, although he could not show that he personally had suffered any injury.

Zamir [50] makes the pertinent observation that "no formula generally applicable has been provided by legislation," as a means of determining the requirements that must be met to give a person a standing in a declaratory action; and "the judges have been careful not to tie their hands by an exhaustive definition of *locus standi*." With that few would disagree.

CONCLUSION

To what extent can we venture to state principles which may be of assistance in deciding whether a prospective plaintiff has sufficient *locus standi* in this context?

(1) In the first place, it seems clear that the "interest" for a declaration must be at least as "real" as it is for certiorari, and possibly it must be "more so."

(2) By "reality" of interest is meant some interest by reason of the plaintiff's legal rights being affected, his liability to pay a tax the validity of which he is questioning, his property rights, or by reason of his personal position *vis-à-vis* the public agency whose action he is questioning (as in the instance where he needs to know whether planning permission is required or some notice served on him is valid or invalid).

(3) In a case where the plaintiff is seeking to invalidate some decision of a government agency he will need to have such an interest as above mentioned if he is alleging that the decision is voidable only.[51]

(4) In spite of the propositions already adumbrated, a ratepayer-plaintiff, as such, may have sufficient interest to impeach the validity of some act of his local authority, at least where that act has financial consequences.[52]

(5) *But* if the would-be plaintiff is asking for the answer to a hypothetical question, he will never be held to have a sufficient interest to justify his taking proceedings, as the court cannot be used as an expert consultant.

Further than this, one can only say that, like an elephant, an "interest" is a difficult animal to describe with exactitude but comparatively easy to recognise when one meets one.

J. F. GARNER.*

[50] *Declaratory Judgment* at pp. 245–246.

[51] As in *Ridge* v. *Baldwin* [1964] 3 All E.R. 64; it is suggested in *Durayappah* v. *Fernando* (note 28, *supra*) that no one but Mr. Ridge himself would have had a sufficient interest to impeach the action of the watch committee in deciding against Mr. Ridge, without affording him a right to a hearing.

[52] It is, surely, doubtful whether, even in the face of *Prescott* v. *Birmingham Corporation* (*supra*), a ratepayer as such would in this country be held to have sufficient standing, where the decision impeached could not possibly affect the amount of the rates he would be liable to pay.

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MORALITY AND THE INTERNATIONAL LEGAL ORDER

" La paix servira mieux la justice que celle-ci ne servira la paix." [1]

WHY should the structure of the international legal order affect its content, in particular its ability to embody principles of morality? It is the aim here to attempt an answer by examining certain aspects of the Eichmann affair which have hitherto received little attention. In the process the significance of De Visscher's words will become apparent.

On May 11, 1960, Adolf Eichmann, who had been living in Argentina for some time under the name of Richard Klementz, was taken to Israel by certain Israeli nationals. It is not clear whether Eichmann left voluntarily or under duress or how far those who removed him were acting with the authority of Israel. What is clear is that the removal of Eichmann from Argentina was performed without the knowledge or authority of Argentina. For this reason Argentina submitted to the Security Council a complaint alleging that by effecting the seizure Israel had violated Argentina's territorial sovereignty. After some discussion the Security Council adopted on June 23, 1960, a resolution [2] condemning Israel's action. As a result of this resolution Israel and Argentina agreed to settle their differences and on August 3, 1960, published a joint statement [3] to that effect. With Eichmann's subsequent trial, conviction and execution we are not here concerned.[4] The issue of Eichmann's removal from Argentina and the Security Council's handling of the matter alone gives rise to some interesting problems of the present adequacy of international law.

In an article [5] which appeared shortly after the above-mentioned events Professor Silving argued at length the case for the acceptance into international law of the principle of inexigibility, taking the Eichmann incident as an example of the desirability of such a

[1] De Visscher, *Théories et Réalités en Droit International Public*, 3rd ed., rev. 1960, p. 448.

[2] UN Doc. S/4349. For the text of this resolution see the Appendix.

[3] The joint statement was as follows: "The Governments of Israel and the Republic of the Argentine, imbued with the wish to give effect to the resolution of the Security Council of June 23, 1960, in which the hope was expressed that the traditionally friendly relations between the two countries will be advanced, have decided to regard as closed the incident that arose out of the action taken by Israeli nationals which infringed fundamental rights of the State of Argentina." See Papadatos, *The Eichmann Trial*, p. 60, note 54.

[4] For discussion of these citations see, *inter alia*, Fawcett (1962) 38 B.Y.B. 181 and Papadatos, note 8, *supra*.

[5] 55 A.J.I.L. 807, henceforth cited as " Silving," reprinted in Mueller and Wise, *International Criminal Law*, p. 290.

principle. Inexigibility requires that in certain exceptional cases positive law shall yield to the demands of morality. The operation of this process is described as follows:

> "The ethos of humanism calls for consideration of a wide variety of human needs, aspirations, and demands. Were such ethos to be generally introduced into law through the medium of natural law, that influence would be widely felt. Obviously, the type of ethics advocated in this paper affords no principle of limitation. A comprehensive humanistic policy ought to be incorporated into law through the normal processes of creation of 'positive law.' The minimum natural law to be admitted outside of the framework of such processes, and indeed exceptionally in contravention of positive law, must be subject to a clear, preferably external, limitative test, which would effectively reduce the number of qualified 'natural law' demands to a necessary minimum. It is submitted that such a test ought to be that of an overwhelming recognition by the civilized nations of the world that the interest in issue is itself morally justifiable and that under the circumstances of the concrete case that interest is exceptionally intensive—indeed so intensive as to warrant unique treatment. This feature of overwhelming recognition of the justifiability of the contents of the interest involved gives that interest the character of a 'natural law' value. Moreover, the concrete situation must evince such disproportion in strength between the natural-law interest and the positive-law claim as to make sacrifice of the former to the latter appear as a surrender of the spirit of justice to its letter, evoking in the conscience of a majority of average people the sentiment which Edmond Cahn has aptly named man's 'sense of injustice.'" [6]

Inexigibility is, then, a carefully circumscribed principle not intended to supplant the normal processes of creation of international law and consisting of two elements, a general recognition of the moral validity and intensity of the claim and an evident disproportion between the natural-law interest and the positive-law claim. In Professor Silving's submission the application of such a principle to the facts of the Eichmann abduction would have caused the Security Council to exonerate Israel from any violation of the sovereignty of Argentina. While prepared to challenge the assertions that Israel was directly implicated in Eichmann's removal and that such removal was not voluntary, Professor Silving argues that even if Israel's version of the events be discounted in favour of Argentina's so that Eichmann's removal was assumed to be both forcible and officially organised the inexigibility principle would and should have operated to exonerate Israel.

This then is the thesis. Two questions at once arise. How far would inexigibility be acceptable in international law? What light does the Eichmann incident cast on the problem?

[6] Silving, pp. 309, 310.

I. SHOULD INEXIGIBILITY BE INCORPORATED INTO INTERNATIONAL LAW?

A preliminary comment on the form of this question seems apposite. The form of the question is intended to imply that inexigibility as such is not yet a principle of international law. Although, as we shall see, certain rules of international law may be interpreted as examples of the operation of the inexigibility principle there is as yet no example of the acceptance of the principle as such in the traditional sources of international law. No doubt if one were prepared to define "law" by its content rather than its source it would be possible to argue that inexigibility is a necessary principle of all legal systems whether acknowledged as such or not. Professor Hart has, in the present writer's submission, demonstrated the inadequacy of such a position.[7] Since Professor Silving's advocacy of inexigibility proceeds on other grounds it is not proposed to examine the merits of this theoretical approach to the problem.

In a section entitled "Methodological Investigations"[8] Professor Silving demolishes the case against inexigibility in so far as it rests on assumptions about the essential nature of law and a legal system. To this end it is shown that "it is neither logically nor socio-psychologically possible to eliminate the impact of natural law upon positive law."[9] So far from being repugnant to the nature of law the incorporation of morality into law is shown to be an inevitable process. There is here much with which one can agree and yet there is more to the problem of inexigibility than its conceptual aspect. Inquiry must also determine how such a principle would work in practice. And it is here in our submission that the argument for inexigibility in international law encounters a fatal obstacle.

Inexigibility in municipal law

It is doubtless true that as Professor Silving shows inexigibility is not unknown in municipal systems. Some continental systems accept inexigibility as a principle of law. Though the Anglo-American legal systems do not, they do contain certain legal rules which have clearly been influenced by the same factors as have led other systems to adopt the inexigibility principle. Thus the Anglo-American rules of law governing, for example, frustration of contract and self-defence might be justified on the ground that it is generally considered unfair or unreasonable for the law to demand conduct which is actually or virtually impossible. Such a justification embodies concepts which bear an obvious resemblance to those advanced by Professor Silving as relevant to the inexigibility principle, *i.e.*, a general consensus as to the moral validity of the

[7] See Hart, *The Concept of Law*, Chap. IX, and 71 H.L.R. 606.
[8] Silving, pp. 347–358.
[9] *Op. cit.* p. 354.

claim and an evident disproportion between the natural-law interest and the positive-law claim. Though such an analysis of rules of municipal law is an over-simplification it is suggested that in such cases municipal systems, without recourse to arguments based on morality or natural law, apply the same kinds of ideas in practice as those systems which apply inexigibility as a principle of law. It is equally true that the subject's actual or virtual inability to act otherwise than he did is allowed in some cases to exonerate him only partially (*e.g.*, killing under provocation) or indeed not to excuse him at all (offences of strict liability). Adopting an inexigibility analysis one may say that here compliance with the general rule is still wholly or partially demanded on the grounds either of lack of consensus as to the moral validity or intensity of the claim or lack of the requisite disproportion between the natural-law interest and the positive-law claim. Whatever the reason may be (and there may of course be reasons for a rule which an analysis in terms of inexigibility does not disclose) it is clear that a court which finds itself in a potential inexigibility situation must first determine the facts where these are in dispute and must then examine, though not necessarily in these terms, the question of whether the case before it as a matter of law requires a complete or partial dispensation from the general rule.

Inexigibility in international law

So far then we have seen that the inexigibility principle or the ideas embodied in it operate successfully in municipal law. Many problems of international law can be illuminated by reference to the experience of municipal systems and the problem of inexigibility is no exception. It will be the argument of this paper that the successful operation of inexigibility in municipal systems rests upon features of the structure of municipal law not to be found in international law. The structural difference between international and municipal law is well brought out by Professor Falk's comparison of horizontal and vertical systems of legal order:

> "There is vertical or hierarchical order among formally unequal centers of legal authority: there is horizontal or non-hierarchical order among equal centers of legal authority. . . . Compared to the domestic legal order, the international domain exhibits a low degree of centralisation of authority. The international community lacks adequate institutions of impartial interpretation and enforcement to provide authoritative delimitations of state legal competence. To achieve international order, it is therefore necessary to rely upon a horizontal distribution of authority and power among independent states." [10]

It is proposed to examine three areas where this structural difference is most apparent and to assess the implications of each

[10] Falk, *The Roles of Domestic Courts in the International Legal Order*, pp. 21–22.

structural difference on the possibility of successfully incorporating the inexigibility principle into international law. The three areas are (a) the fact-finding process, (b) the law-developing process and (c) the dispute-settling process.

(a) The fact-finding process: here international law is generally admitted to be defective.[11] No regular machinery for the determination of controversial questions of fact yet exists. This is relevant to the inexigibility question in two ways. First, just because in many disputes there will be doubt about the facts it is important to ensure that in those disputes where the facts can be ascertained the law is clear too. Yet it will be argued under (b) below that precision is just what the inexigibility principle lacks. Secondly, inadequate fact-finding processes obviously offer the law-breaker considerable freedom. Since this is so, there is good reason to reject a proposed principle of law which, it will be argued under (c) below, would offer even further scope for such action.

(b) The law-developing process: the decentralisation of much important decision-making is important too when we consider whether inexigibility in international law could ever evolve in the way that principles of inexigibility have evolved in municipal law.[12] Here too the answer would seem to be no. Professor Silving recognises the fundamental importance of precision of definition and careful delineation of principle in this area:

> "... in order to keep natural law within the confines of exceptionality, it is necessary to formulate a test of the 'exceptional,' which could be effectively utilized in opposing indiscriminate claims to exceptional treatment. The German law of the postwar era has developed such a test for differentiating the exceptional from the normal case. This test affords an assurance that the exceptional will not be used as a precedent for disposition in a normal situation. It is a very stringent test, in a twofold sense: it postulates (a) admission of natural law exclusively within the framework of a minimum concept of

[11] The General Assembly of the United Nations has devoted some attention to this problem recently. See resolution 2104(XX). The recent alleged attack on a South Arabian town under the protection of the United Kingdom gave rise to discussion in the Security Council illustrative of present problems of fact-finding. When an impartial investigation can be prevented on the ground that, as the Soviet Union put it, "... the United Kingdom's claim is without foundation, nothing but a fabrication," an allegation which one might innocently assume impartial investigation would be well suited to establish, the pathetic inadequacy of present fact-finding processes is apparent. See S/PV 1297 (provisional) 47–50.

[12] There is a danger of being misled here by indiscriminate adoption of the terminology employed by McDougal and others. There are no doubt in international law many "authoritative decision-makers" but such terms should not blind us to the fact that in contrast to municipal law the "authoritative decision-makers" of international law are for the most part also the principal subjects of that law. Such decision-makers necessarily employ a somewhat different perspective from their counterparts in municipal law and on this account may not always appropriately be entrusted with the same kinds of decisions. Stone makes an analogous point in (1956) 89 Hague Recueil 88, note 1.

> that law, and (b) general agreement on the justifiability of the moral demand. It should be noted that the test is couched in limitative negative language. The source of moral judgment is not an ambiguous ' sense of justice,' but a clear and limitative ' sense of injustice '—indeed a ' sense of flagrant injustice.' " [13]

For this reason it is possible for Professor Silving to conclude that

> " It is significant to note, though the principle of ' supra-statutory law ' has been in force in Germany for many years, there has been no evidence of its abuse by the courts, in the sense of application to situations that are not truly exceptional." [14]

It is seriously to be doubted whether inexigibility would fare so well in international law. But, it may be said, surely it would have been possible for the Security Council in the Eichmann case to have defined inexigibility in the above terms, why would this not dispose of the problem of definition? There are two reasons. First, however carefully the Security Council had defined inexigibility it is doubtful if states would feel for long restrained from opening Pandora's box and supplying their own definitions. Since such definitions would be resorted to when some apparent breach of the rights of another state had been committed, such unilateral definition would be a fruitful source of international dispute. Secondly, even if by a remarkable display of self-restraint states confined their use of the inexigibility principle to the terms laid down by the Security Council such a definition, as Professor Silving is the first to admit, would be no more than a starting-point: " Though words have limits of ' meaning,' they are never entirely unambiguous, and within the scope of their ambiguity the law interpreter must choose between varieties of meaning." [15]

In the light of the fact that in international law the law interpreter will usually be a state interested in either asserting or denying that a particular situation raises a question of inexigibility, the effect of admitting a principle such as inexigibility into a decentralised system of order can be predicted. It is of course possible that some problems will come before the central organs as the Eichmann incident came before the Security Council. But it is to be doubted whether such a highly political body is really an appropriate or an acceptable forum for the evaluation of moral issues or the progressive development of a legal principle which rests on such an evaluation. The International Court of Justice could no doubt perform such a task but seems unlikely ever to be given the opportunity. For resort to the Court, already rare, would hardly be enthusiastically indorsed by the state invoking the inexigibility principle the essence of which is that there should be granted a special dispensation from the observance of an *admitted* rule of law.

[13] Silving, p. 845.
[14] *Op. cit.* p. 844.
[15] *Op. cit.* p. 850. And see Hart, *The Concept of Law*, Chap. VII, and the following significant index entry: " Certainty of Law," *see* Uncertainty.

Nor could recourse to the Court really be expected on the part of the state against which the inexigibility principle was invoked. Few states would be willing to jeopardise their legal position by giving the Court the opportunity to declare that by reason of the inexigibility principle their opponent's argument was well founded. As Dr. Jenks has said:

> " . . . it is one thing to go to a tribunal without being certain that you will necessarily win but reasonably confident that the matter will be handled on the basis of general principles which you accept and it is an altogether different matter to go to a tribunal with a feeling that some new element which you regard as totally unorthodox and outside the limits proper for the judicial development of the law is liable to be injected into the consideration of the matter in an unpredictable manner." [16]

Would not such a feeling be rather common if the Court were liable to invoke the inexigibility principle? A court which lacks compulsory jurisdiction must tread warily in exercising a law-creating function or it will soon find it has no business. There is evidence that this fear has inhibited the Court's development of rules of law. How much more strongly then would this factor of non-compulsory jurisdiction militate against the adoption of principles, however narrowly defined, based on morality or natural law. It is true that some states are subject to the compulsory jurisdiction of the Court. But at a time when the decline of the optional clause represents a growing reluctance to accept the Court in its role as an *exponent* of international law it is difficult to see how the Court could *develop* international law by applying inexigibility, a new and fundamental principle, without exacerbating this decline.

(c) The dispute-settling process: in the Security Council debate the representative of Argentina, Dr. Amadeo, said:

> " The law is not always on the side of the sentiments of the multitude; often it is unpopular. But its very fragility demands that precautions be taken to protect it. Not even by way of exception can its violation be justified." [17]

And:

> " One single breach in the juridical order will cause the whole structure to fall." [18]

Professor Silving argues that this is a suggestion that any legal exemption or change in the law would be conceptually repugnant

[16] Jenks, *The Prospects of International Adjudication*, p. 106. It is true that as Dr. Jenks goes on to say over-emphasis on the dangers of innovation can stultify the law. Our point is simply that states would not be prepared to take to the Court cases in which a decision based on inexigibility might be given. One cannot therefore envisage the Court playing a useful law-developing role in this area.

[17] *Op. cit.* p. 319 (Professor Silving's translation).

[18] *Op cit.* p. 318.

to the notion of law. It has been conceded above that any such suggestion is ill-founded. With respect, however, to Professor Silving's interpretation, it is more convincing to read Dr. Amadeo's statement as an observation not about the nature of law in general but about the practical possibilities of operating a principle of inexigibility in international law. As we have already seen, the absence of fact-determining and law-determining agencies of the appropriate kind are two serious drawbacks to inexigibility. The third which is closely related to the second is the absence of an acceptable forum for the adjudication of claims. For, as we have seen, the courts in municipal law operate not only to find the facts and lay down the principles by which future conduct may be guided but also to decide particular controversies relating to the scope of any alleged exemption. Thus if A asserts that his contract with B is frustrated B does not have to take A's word for it, if he is in any doubt he can refer the question to a court for authoritative decision. But in international law the absence or impotence of impartial organs operates to prevent the determination of controverted claims with the result that exaggerated claims can often be made with impunity.

It is true that the observation of Grotius that " . . . a right does not cease to exist because it may be abused by evil men," [19] made with reference to humanitarian intervention, can be applied to international law generally. Nevertheless, though the possibility of abuse must obviously exist in regard to any principle of a horizontal legal order, such a possibility cannot be dismissed as unimportant or irrelevant. More particularly, when the question concerns the recognition of a new principle of law the possibilities of abuse must be weighed against the alleged advantages of the proposed principle. How far would inexigibility be open to abuse? The principle of self-defence is instructive.

The abuse by states of the principle of self-defence to justify aggressive acts furnishes a good example of how a legal principle may be used to buttress unfounded claims.[20] The similarities between self-defence and inexigibility are obvious enough. Each justifies conduct which would otherwise be an infringement of a general prohibition. Of the two, however, inexigibility would seem to be the more open to abuse. For inexigibility is not just another principle of law. However narrowly defined it is a very fundamental principle excusing conduct which contravenes the general rule. And the general rule here is potentially *any* general rule. It therefore operates as a legal justification for the infringement of any

[19] " . . . non ideo statim ius esse desinit si quid a malis usurpatur " (*De Jure Belli ac Pacis* 2.25.8.4.).

[20] See, for example, Bohan's argument that the United States claim to intervene in Santo Domingo in the exercise of the right of self-defence demonstrates " the possibilities for the misuse of international law as an instrument for the self-righteous justification of illegal acts " ((1966) 60 A.J.I.L. 809).

part of international law.[21] In a system where excessive claims cannot be readily controlled it is easy to see how the law-breaker would use inexigibility to throw a cloak of apparent legality over his conduct. Such abuse would be easy when all that is required is unregulated reference to the concepts of consensus and overwhelming natural-law interest. There is no reason to believe that states would scruple to narrow the notion of consensus so that the states whose views were considered important were those with the same special interests as the state invoking the principle.[22]

The controversial principle of *rebus sic stantibus* is another instructive analogy. This principle is again one which offers tempting possibilities for abuse. The International Law Commission, alive to these possibilities, in its draft on the law of treaties [23] has proposed measures to prevent such abuse. Thus, besides a narrow definition of the principle in Article 59, Article 62 contains procedural provisions to apply whenever the principle is invoked. Article 51 of the Charter represents an attempt to place similar procedural safeguards on the principle of self-defence. These provisions surely make it clear that it is thought necessary to try to forestall abuse of those principles of international law which offer exemption from observance of the general rule. Yet no suggestion is made by Professor Silving as to how abuse of the inexigibility principle might be checked.

If inexigibility is, as has been argued, so open to abuse, the effect of accepting it into international law would be to confuse legal argument [24] and to encourage unlawful conduct by providing a legal principle which could apparently justify it. These must surely be counted fundamental objections since it is admitted by Professor Silving that the cases to which inexigibility would genuinely apply are very few indeed.

To avoid misunderstanding, the point which is being made here is not that until international law conforms to a vertical model it can hardly claim to be law at all or that one should make the mistake of identifying " progress in the stabilisation of international

[21] It could perhaps be argued (though Professor Silving does not appear to support this) that some rules of international law were by their very importance incapable of being overridden by the inexigibility principle. Even so, however, the same problems of law-determination and law-enforcement would arise.

[22] This way of thinking is apparent in Cuban Law No. 851 authorising the expropriation of American interests in Cuba which states, *inter alia*: " it is the duty of the peoples of Latin America to strive for the recovery of their native wealth by wresting it from the hands of the foreign monopolies and interests which prevent their development, promote political interference, and impair the sovereignty of the under-developed countries of America " (quoted in Higgins, *Conflict of Interests*, p. 68).

[23] See Report of the International Law Commission on the work of its Eighteenth Session, A/CN.4/191, July 28, 1966; reproduced in (1967) 61 A.J.I.L. 258.

[24] Such confusion is a serious matter since " A main function of international law is to establish an agreed system for the communication of claims and counterclaims between international actors and thereby to structure argument in diplomatic settings " (Falk (1966) 60 A.J.I.L. 786).

relations exclusively with centralisations of authority and power." [25] For recognition of the value of a horizontal system of order is compatible with, indeed necessitates, the rejection of particular rules which seem to require for their functioning elements characteristic only of a predominantly vertical system. Inexigibility is, it is suggested, such a principle. Professor Falk is careful to point out that while it is a mistake to minimise the potentialities of a horizontal system yet there is a need for "*vertical* control of the national resort to force." [26] Once it is accepted that resort to the use of force in a predominantly horizontal system cannot readily be controlled, the admission of the inexigibility principle which would weaken still further the system's already inadequate vertical controls can hardly be contemplated. Professor Silving's observation that ". . . self-defence has been admitted into the fragile structure of international law without so far causing it to collapse" [27] is not really apposite. For it is surely not necessary to show that Dr. Amadeo's prediction of the collapse of international law is likely to be fulfilled if it can be shown that the probable disadvantages of adopting the inexigibility principle outweigh any advantages. This, it is suggested, has been done. In any case, can it seriously be argued that self-defence in international law has operated so satisfactorily as to warrant emulation? It would rather seem that this doctrine exhibits the limitations of a horizontal system of order and though doubtless necessary can hardly be advanced to justify the incorporation into international law of a principle of inexigibility which would operate as a general, and not merely a particular, exemption from law observance.

The greatest concession towards the view advanced here is Professor Silving's rejection of the doctrine of necessity in international law:

> "Since the principle of 'weighing interests' calls to mind the process applied in the application of the 'necessity principle' it may be pertinent to state that the acceptance of the latter in international law at this time would constitute a real danger. 'Necessity,' as defined by penal laws, justifies sacrifice of a lesser interest belonging to another in order to safeguard one's own more valuable interest. Even in well-organised national laws, provided with efficient instrumentalities of adjudication, this principle based on the idea of 'self-help,' ought to be strictly limited. It has certainly no place in international law, which does not at present possess an effective machinery for adjudging and controlling acts of this type." [28]

In other words "necessity" is rejected as too dependent on the

[25] Falk, *The Role of Domestic Courts in the International Legal Order*, p. 28. Falk rightly criticises this commonly adopted attitude towards international law.

[26] Falk, *op. cit.* p. 23.

[27] Silving, p. 329.

[28] *Op. cit.* pp. 320, 321.

vertical elements of the legal order.[29] It is not explained why inexigibility should be different.

II. The Eichmann Incident

It has been argued above that the inexigibility principle is not suited to the horizontal structure of international law. Three aspects of the Eichmann incident will now be examined to illustrate the difficulties which appear when it is sought to apply inexigibility to a specific case.

(a) The moral consensus: in determining whether there was a moral consensus Professor Silving's reference to the "reaction of mortal men everywhere" is not really helpful. For as Professor Silving recognises elsewhere, though it is meaningful in some contexts to regard the individual as a subject of international law, states are still the principal subjects on whom decision-making rests. It is therefore the attitudes of states rather than "the reaction of mortal men everywhere," however that might be assessed, which are what really matter. The Security Council Resolution can arguably be said to express a moral consensus that Eichmann be tried, though it is implicit in what has been said above about the suitability of the Security Council as a forum for the application of the inexigibility principle that attempts to deduce moral attitudes from the result of the vote in a political body are fraught with difficulty. Nevertheless, even granting that a moral consensus that Eichman be tried was manifested it is not at all clear whether there was a moral consensus on the distinct question of whether Israel was morally entitled to violate Argentina's sovereignty to obtain custody of Eichmann. It is certainly apparent that states were not prepared to give legal effect to any such consensus.

(b) The morality of Israel's action: the seizure of Eichmann from Argentina may be explained from the moral aspect in either of two distinct ways. Either it may be said that Israel was morally justified in effecting the seizure, in which case the seizure is taken as the vindication of a moral value, or it may be said that the seizure was to be excused, in which case emphasis is placed not on the value vindicated but rather on the absence of any real alternative course of action. Whichever approach is adopted it is clear that what is sought to be explained is a derogation from the competing general moral obligation to obey the law. In resolving the conflict the following are important considerations.

If Israel's action is sought to be justified there must be set against the universal interest in the bringing to justice of a prominent war criminal the precedent value of the breach of the moral obligation to obey the law which this involved. As G. E. Moore pointed out:

[29] *Cf. Busa, Acta Juridica* Tomus I, Fasciculi 3–4, 205, where the case for the necessity principle is argued. No real account is taken of the distinctive characteristics of international law.

> " . . . the universal observance of a rule which is generally useful has, in many cases, a special utility, which seems deserving of notice. This arises from the fact that, even if we can clearly discern that our case is one where to break the rule is advantageous, yet, so far as our example has any effect at all in encouraging similar action, it will certainly tend to encourage breaches of the rules which are not advantageous. We may confidently assume that what will impress the imagination of others will not be the circumstances in which our case differs from ordinary cases and which justify our exceptional action, but the points in which it resembles other actions that are really criminal. In cases, then, where example has any influence at all, the effect of an exceptional right action will generally be to encourage wrong ones." [30]

This has an obvious relevance to alleged exceptions to the general moral obligation to obey international law. For the precedent value of action is greatly enhanced in a horizontal system of order characterised as it is by the absence of central institutions to enforce obedience.

If the question is whether Israel's conduct is to be excused rather than justified it is necessary to examine the pressure on Israel to effect the seizure. It is clear that Israel had very strong reasons for wanting to obtain custody over Eichmann and put him on trial. When examining the value of this interest it is, however, worth noting that stronger examples of inexigibility can be imagined. The doctrine of self-defence permits a state to act in self-preservation. Response to attack may be compared to a reflex action. Unless force is used the state's existence would be seriously jeopardised. Frustration of contract rests on the notion that the law will not usually demand the impossible. Israel, though as we have said her interest was great, was not in either a " reflex action " nor an " impossible " situation. Observance of international law, though difficult, would have been possible. Israel's action was in fact more like an act performed under extreme provocation, an area where in English law at least the infringement of law is recognised as of diminished importance but not completely excused.[31]

(c) The interest of Argentina: in assessing Argentina's interest Professor Silving concludes that the allegation of infringement of sovereignty exhibited a regrettable " ' thinghoodbound ' conception of international law " which the Security Council endorsed.[32] That

[30] G. E. Moore, *Principia Ethica*, § 99.

[31] Professor Silving recognises Israel's true position by saying that conformity with international law was only " relatively " impossible. See Silving, p. 826.

[32] The following illustrate what is meant: " . . . in the humanities, in ethics and in law, we are still deeply ingrained in a world of ' things,' of the concrete and tangible, although a tendency toward abandonment of this orientation is increasingly noticeable. Personality values not tied to external, visible and tangible objects are emerging very slowly. In international law this process lags behind that observable in national legislation. Thus, for

is to say, the real interests at stake were ignored in favour of a mechanical application of crude principle. What is the relevance of this criticism? Professor Silving quotes Whitehead to the effect that "It is the task of reason to understand and purge the symbols on which humanity depends." [33]

Quite so, but is it the task of the Security Council? Suppose it is admitted that Argentina had no "real" interest which was infringed by Israel's action, in the sense that neither Argentina's international standing nor her internal stability was adversely affected. It is to be noted first of all that this argument is a good illustration of the *ex post facto* vice of the inexigibility principle. For though we assume no damage was done to any real interest of Argentina it cannot be denied that there was a real *risk* of some damage. The inexigibility principle, however, encourages the taking of such risks by the assurance that, provided no such damage occurs, the infringement will be excused. It is all very well to say that if actual damage occurs inexigibility will not apply but by then it is too late. The promotion of world order would not be served by a rule which encouraged the taking of such risks.[34] In the second place there seems no reason to doubt that Argentina *considered* that a vital interest of some kind was jeopardised. Territorial sovereignty is a subject on which, as the Security Council debate demonstrated and Professor Silving admits, states are notoriously

example, while spying on another state in the course of an authorized stay therein is widely practised, there is deep resentment when the wrong consists in a wrongful 'touching' of the territory of another state for this violates 'sovereignty' in an 'immediate' rather than 'consequential' manner, 'sovereignty' being apparently conceived of as a physical entity rather than as the realm of a people's privacy": Silving, p. 307. "In order to adapt itself to an age of science and to become a modern instrument for the protection of all the values that are significant to contemporary man, international law must develop in a direction parallel to that of science. It must abandon its predominant orientation towards concrete 'things' and incorporate a broader notion of 'morality'—morality in the sense of substantive value ethics of modern man, of humanistic ethics focused on man's dignity as a comprehensive ideal, concerned with all of man's human characteristics, his aspirations, and his conflicts": Silving, p. 308.

[33] *Op. cit.* p. 321.

[34] Forcible removal can of course easily occasion a breach of internal public order. Here it is instructive to compare Eichmann's removal from Argentina with the attempt of the U.A.R. to remove one Dahan from Italy. Dahan was drugged and strapped inside a crate which was taken to Rome airport as "diplomatic luggage." The victim's shouts aroused the suspicions of Italian customs officials who were not convinced by the explanation that the crate contained musical instruments. There was a struggle and an attempt was made to make off with the crate on a lorry. The lorry was chased and caught and the crate opened. Italy protested at this breach of the principles governing diplomatic immunity and declared the two embassy officials *personae non gratae*. The U.A.R. counter-protested on the ground that no embassy official was present when the crate was opened but though denying knowledge of the incident withdrew the two officials concerned. See *The Times*, November 19, 1964. Further examples of forcible abduction are discussed by Marchand (1966) VII *Journal of the International Commission of Jurists* 248.

sensitive.[35] It is all very well to urge that an interest which is perceived rather than actual should be disregarded as a hangover from a less scientific legal age but it must be remembered that international law, though it can shape the attitudes and actions of states, must in order to operate successfully to a very large extent also reflect the attitudes of states, though some of those attitudes may be thought legally unsophisticated. This is particularly so in an area which the horizontal structure of international law renders particularly sensitive. And territorial sovereignty is such an area. It does not take much imagination to envisage the danger of conflict had Eichmann been seized from the U.A.R. rather than Argentina and yet the " real " interest infringed would have been equally illusory. If world order is not to suffer the bringing into line of real and perceived interests must be a gradual process. Had the Security Council condoned action by one state in violation of the perceived interest of another state the protection afforded by international law would have seemed illusory to just those states which need it most.[36]

III. Conclusions

The above arguments yield the following conclusions:

(1) Municipal experience in the operation of rules of law can be of great value to the international lawyer. But the operation of any particular rule of law in the municipal system must be assessed in the light of the important structural differences between international and municipal law.

(2) Inexigibility is a good example of a principle of municipal law which relies heavily on the vertical nature of municipal law. The predominantly horizontal structure of international law, at present characterised by very imperfect processes of fact-determination, law-development and dispute-settlement, renders inexigibility unsuitable for incorporation into international law.

(3) The result of incorporating the inexigibility principle into international law would be to confuse legal argument and encourage law-breaking. As against this the benefit of bringing into line legal and moral obligation in cases admitted to be very exceptional would be very small.

(4) The Eichmann incident reveals the practical disadvantages of the inexigibility principle, particularly the risks it involves and the difficulty of evaluating a state's conduct in moral terms.

(5) More generally, Professor Silving's argument for inexigibility is a result of a failure to accept the importance of the distinction

[35] The South American states have suffered more than most from foreign intervention. It is therefore not surprising that Argentina should attach such importance to the concept of her territorial sovereignty.

[36] International law is not alone in exhibiting a " thinghoodbound " tendency in order to take account of perceived interests. To steal a kiss is after all to run the risk of being sued for assault. Though whether this is ever a deterrent is another matter.

between legal and moral obligation. In some cases no doubt the moral obligation to obey the law is displaced by a stronger moral obligation to disobey. Even if the overriding moral obligation is generally recognised it is important to realise that it may not be possible or desirable to try to frame a rule to legalise such conduct. In our submission in cases of inexigibility in international law the distinctive horizontal nature of the system has just this effect.

J. G. MERRILLS.*

APPENDIX

" The Security Council,

Having examined the complaint that the transfer of Adolf Eichmann to the territory of Israel constitutes a violation of the sovereignty of the Argentine Republic,

Considering that the violation of the sovereignty of a Member State is incompatible with the Charter of the United Nations,

Having regard to the fact that reciprocal respect for and the mutual protection of the sovereign rights of States are essential conditions for their harmonious co-existence,

Noting that the repetition of such acts as that giving rise to this situation would involve a breach of the principle upon which international order is founded, creating an atmosphere of insecurity and distrust incompatible with the preservation of peace,

Mindful of the universal condemnation of the persecution of the Jews under the Nazis and of the concern of all people in all countries that Eichmann should be brought to appropriate justice for the crime of which he is accused,

Noting at the same time that this resolution should in no way be interpreted as condoning the odious crimes of which Eichmann is accused,

1. Declares that acts such as that under consideration, which affect the sovereignty of a Member State and therefore cause international friction, may, if repeated, endanger international peace and security;

2. Requests the Government of Israel to make appropriate reparation in accordance with the Charter of the United Nations and the rules of international law;

3. Expresses the hope that the traditionally friendly relations between Argentina and Israel will be advanced."

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PRORATING IN THE ENGLISH LAW OF FRUSTRATED CONTRACTS

AN as yet unresolved problem in the law of frustration is the legal position of a trader who has entered into a number of contracts to supply goods to customers prior to the occurrence of a prima facie frustrating event which results in the trader not being able to perform all these contracts in full but leaves him able to perform either some in full or all in part. This could arise where a merchant undertakes to supply goods from a defined source to his customers.[1] Suppose this merchant has entered into contracts to supply 1,000 tons of the goods to each of five customers and, as a consequence of a partial failure of supply, resulting from a crop failure or cattle epidemic or an outbreak of hostilities, he only obtains a total of 1,000 tons to fulfil his commitments. Assuming that the circumstances of supply are perfectly well known to the customers and accepted by them as basic to the agreement and that the merchant is in no way at fault for having misled his customers or entering into more contracts than he could reasonably have expected to fulfil, what then, in the absence of a clearly applicable exemption clause, is his position? One solution might be that he should apportion 200 tons apiece to each customer and, although a customer could not be compelled to accept such a reduced quantity, the merchant would be regarded as discharged from further liability.[2] Another and much harsher solution would be to say that the trader should perform one of his five contracts as he has sufficient goods to do that and in respect of the four other contracts be liable for breach of contract on the footing of self-induced frustration, since his own act or election in allocating all the goods to one amongst the contracts was the immediate cause of his not being able to perform the others.[3]

[1] See *Tennants* v. *Wilson* [1917] A.C. 495 (chemicals from Germany); *Pool Shipping* v. *London Coal Co. of Gibraltar* [1939] 2 All E.R. 492 (coal to come from bunker depot in Gibraltar); the example based on *Howell* v. *Coupland* (1876) 1 Q.B.D. 258 (potatoes to be grown on specified land) in *McElroy and Williams on Impossibility of Performance* at p. 240; illustrations to § 464 of the *Restatement of Contracts* (cargo of specified vessel and goods to be produced in a specified factory).

[2] McElroy and Williams, *op. cit.* p. 241; *Restatement of Contracts*, § 464; U.C.C., s. 2–615 (*b*).

[3] This would follow from some of the language in *Maritime National Fish* v. *Ocean Trawlers* [1935] A.C. 524 at p. 530: "It is immaterial to speculate why they preferred to put forward for licences the three trawlers which they actually selected. Nor is it material, as between the appellants and the respondents, that the appellants were operating other trawlers to three of which they gave the preference. . . . The essence of frustration is that it should not be due to the act or election of the party." The appellants operated five trawlers, one of which they chartered from the respondents. They allocated their three licences to vessels other than the respondents' and claimed

An intermediate solution which might be available when the contracts had different dates for performance would be for him to perform the contract with the earliest delivery date and be regarded as discharged by frustration in respect of the others.[4]

In the United States, where this problem has attracted more attention than in this country, the first of these courses has been favoured. This form of proportionate rationing amongst all affected parties, or " prorating " as it is termed, is accepted in the American *Restatement of Contract* [5] and the Uniform Commercial Code [6] and its detailed application is examined in *Corbin on Contracts*.[7]

Corbin approaches the question of prorating as primarily a principle to be applied in construing broad exemption clauses which purport to excuse parties because of the operation of " causes beyond their control " or the like.[8] Should the causes not eventuate in a total cessation of supply the party relying on the excuse should be liable to make a partial delivery and the other party to accept his appropriate quota.[9] Corbin goes on to argue that the principle of prorating should be applied whether or not an express exemption clause has been included in the contract since the " fundamental assumptions " on which contracts are made are the same whether or not there are express provisions in the contracts and risks should be allocated on the basis of these shared assumptions.

> " By so doing the requirements of justice according to the prevailing mores of today will be more effectively fulfilled. It is not justice to throw the risk of uncontemplated contingencies upon a contractor merely because it would have been so in older

its charter had been frustrated. Held, this was self-induced frustration. McElroy and Williams at p. 289 point out that rationing might possibly have been, but was not, raised in the case. Treitel, *Contract* (2nd ed.), p. 624, says that if even one of the three licensed trawlers belonged to the appellants (the reports do not make this clear), then they may have been guilty of an improper preference. Even on this basis the case seems open to criticism. See McElroy and Williams, *op. cit.* pp. 239–240; Sutton and Shannon, *Contracts* (6th ed), p. 825 (q).

[4] See *per* Lord Finlay in *Tennants* v. *Wilson* (*supra*) at p. 508.

[5] § 464 (1): " Where a promisor makes two or more bargains and facts then exist or subsequently occur that on grounds of impossibility prevent the imposition of a duty to perform all the promises in their entirety, or that discharge a duty to do so that has arisen, but partial performance capable of ratable apportionment to the several bargains is possible, the promisor is under a duty to make such apportionment and is otherwise discharged, except as stated in subs. (2)."

[6] U.C.C., s. 2–615 (*b*): " Where the causes mentioned in para. (*a*) (frustrating events) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable."

[7] Vol. VI., § 1342, pp. 408–415.

[8] *Ibid.* pp. 409–410.

[9] *Ibid.* p. 411: " The buyer is bound to take and pay for his fair quota; . . ."

times and because he was not advised by counsel in preparing a written contract." [10]

The *Restatement* and the Uniform Commercial Code, as has been seen, are in accord with this, regarding prorating as a rule of general law as distinct from a mere aid to construction.

For English law *McElroy and Williams on Impossibility of Performance* argue strongly for the adoption of prorating [11] and point out that it seems to have been adopted in the construction of exemption clauses by the House of Lords in *Tennants* v. *Wilson* [12] and by Branson J. in *Pool Shipping* v. *London Coal Co. of Gibraltar*.[13] In *Tennant's* case the appellant suppliers of magnesium chloride found that the outbreak of the 1914–18 war had the effect of very severely reducing the quantity of the chemical available in this country, as considerable quantities had previously come from Germany. The suppliers therefore claimed to be released from contracts entered into before the outbreak of war under an exemption clause which was expressed to allow them, *inter alia*, to suspend deliveries " . . . pending any contingencies . . . preventing or hindering the manufacture or delivery of the article." A majority of the House of Lords held that the shortage which had occurred because of the cutting off of the German supplies " hindered delivery " within the meaning of the exemption clause and rejected the contention that if the suppliers had ignored their other contracts and concentrated all their available supplies to perform the contract sued on they would have had a sufficient quantity for this contract and were, therefore, not hindered in its performance. Lord Haldane said [14]:

> " . . . I do not see how the appellants could have lawfully delivered to the respondents without also delivering proportionately to the other firms with whom they had entered into similar contracts. They were either bound to all their customers equally or they were not bound to any of them."

Lord Dunedin took the matter a little further, saying [15]:

> " They [the respondents] say, however, that if the appellants had supplied them in preference to all others there would have

[10] *Ibid.* p. 409. There is a parallel between this argument and the development of the general doctrine of frustration. In *Paradine* v. *Jane* (1647) Aleyn 26 the court refused to hold a party discharged by supervening impossibility for the reason that "when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, . . . because he might have provided against it by his contract." What in 1647 could only be achieved by exemption clauses became a matter of general common law with *Taylor* v. *Caldwell* (1863) 3 B. & S. 826.

[11] At pp. 240–242.

[12] *Supra.*

[13] *Supra.* McElroy and Williams also cite *Halton* v. *Chadwick* (1918) 34 T.L.R. 290 (C.A.); (1919) 35 T.L.R. 620 (H.L.) but this was a case of rationing provided for by wartime regulations.

[14] [1917] A.C. at pp. 511–512.

[15] *Ibid.* at p. 515.

> been sufficient for them. It is obvious that if this is a good answer each of the other contracting parties could have made it in turn, damages would have been due to all, and the clause would be no protection whatever."

Lord Wrenbury made an interesting comparison with insolvency after demonstrating the same point made by Lord Dunedin, saying [16]:

> " A trader is insolvent notwithstanding that he is able to satisfy one creditor if he is not able to satisfy all his creditors. A merchant has a short supply notwithstanding that he is able to satisfy one customer when he is not able to satisfy all."

Strangely enough, it was the only dissenter,[17] Finlay L.C., who sketched out most fully the possible consequences of applying prorating to the construction of the contract.[18] He said:

> " It is unnecessary to consider what would have been the result if the purchasers under the other sixteen contracts had, like the respondents, insisted on their right to deliveries. Probably it would be held in such a case that the deliveries would fall to be made in the order of priority as they fell due, and that, in the event of delivery being due under several contracts at the same time, the amount which it was possible to obtain to implement the contracts would fall to be divided among them *pro rata*, and that as regards any balance remaining undelivered there would be a prevention within the meaning of the clause."

Thus all members of the House were agreed that in appropriate circumstances the totality of a merchant's commitments could be taken into account in considering his liability and two members, Lord Finlay and Lord Haldane, explicitly favoured prorating as a solution to the problem of short supply.

The second authority cited by McElroy and Williams, *Pool Shipping* v. *London Coal Co. of Gibraltar*,[19] involved a contract by which the defendants undertook to supply Welsh and Durham bunker coal from their depot at Gibraltar to the plaintiffs' ships in 1937. An exemption clause provided that

> " In the event of any cause or circumstance beyond the control of the sellers . . . which prevents . . . the normal working of this contract, sellers shall be entitled to relief from all obligations under this contract. . . ."

[16] *Ibid.* at p. 526. See also to the same effect Lord Loreburn at p. 510, Lord Atkinson at p. 520 and Lord Shaw of Dunfermline at p. 528.

[17] He took the view that since other customers of the appellants were not insisting on the performance of their contracts the quantities of chemical thus made available in fact left a sufficient supply which should have been applied to the performance of the respondents' contract.

[18] [1917] A.C. at p. 508. For the basis on which quotas should be allocated in prorating see *post*, notes 34–48.

[19] *Supra*.

Statistical averages showed that normally 18,600 tons per month of bunker coal were enough to stock the depot at Gibraltar. This proved misleading for the period March–June 1957 as a result of Government advice to public utilities in the United Kingdom to increase their stocks of coal and to a sudden and unexpected boom in shipping. The defendants obtained emergency stocks of more expensive foreign coal and supplied one of the plaintiffs' ships in part from these new stocks and in part from ordinary stocks,[20] charging some £49 in excess of the original contract price. Branson J. held that in considering the meaning of the phrase " normal working of the contract " in the exemption clause he was entitled to take account of the defendant sellers' commitments to other buyers, that the normal working of the contract had been hindered, and that the defendants were justified in the course they had taken, supplying in part out of normal stock and in part out of the more expensive emergency supplies. To this extent he did approve prorating, but he did not embark on any general exploration of its implications.

These two cases might have seemed enough to establish prorating as an aid to the construction of exemption clauses which could, following the course of reasoning suggested by Corbin,[21] have been extended to contracts where no exemption clause appeared. A difficulty might, however, seem to have been placed in the way of this apparently desirable development by some remarks in the advice of the Privy Council in *Hong Guan* v. *Jumabhoy*.[22] The facts were that the appellants, traders in Singapore, entered into a contract to purchase fifty tons of Zanzibar cloves from the respondents, who imported these cloves into Singapore. The contract was expressed to be " subject to *force majeure* and shipment." In December 1950 when the cloves were to have been shipped to Singapore the respondents did in fact ship fifty tons of cloves but they required 875 tons to fulfil their contracts with the appellants and other buyers. The fifty tons were allocated to these other buyers who had got " definite " contracts not expressed to be " subject to *force majeure* and shipment." [23] There seems to have been no question of crop failure [24] and the report leaves the inadequate shipment unexplained. The arguments in the case centred on the " subject to shipment " clause. The respondents contended that its effect was to give them a free choice whether or not to ship the goods but that once the goods were shipped, if they had not been shipped in fulfilment of other contracts, then they were bound to make delivery unless excused by *force majeure*.[25]

[20] [1939] 2 All E.R. at p. 434.
[21] *Supra*, note 10.
[22] [1960] A.C. 684.
[23] *Ibid.* at p. 698.
[24] *Ibid.* at p. 695: evidence that the 1950 crop was three-and-a-half times larger than that of 1949.
[25] *Ibid.* at p. 701. They relied on the judgment of Porter J. in *Hollis Bros.* v. *White Sea Timber Trust* [1936] 3 All E.R. 895, where the phrase " subject to shipment " was not accompanied by any further phrase such as *force majeure*.

The Council Board rejected this contention, saying that it would have deprived the agreement of contractual force.[26] The Board took the view that since "subject to shipment" was coupled with "*force majeure*" the effect of the "double-barrelled" [27] condition was to protect the sellers if they had not been able to perform the contract through circumstances beyond their control and if they were unable to procure goods for shipment.[28] Since, however, the respondents had manifestly been able to procure fifty tons the Board held that the exemption clause did not apply,[29] saying that in the absence of express provision to the contrary, the fact that the respondents had other contracts to fulfil was irrelevant. Lord Morris of Borth-y-Gest, who delivered the advice of the Board, distinguished *Tennants* v. *Wilson* and *Pool Shipping* v. *London Coal Co. of Gibraltar* on the ground that it was the exemption clauses in those cases which had enabled the courts to look at a party's other commitments.[30] He continued: "There are no words in the present contract which enable the respondents to excuse their failure to deliver by reference to their other commitments."

Elsewhere [31] he said:

> "Their Lordships are clearly of the opinion that the respondents cannot be allowed to excuse their non-performance by reference to their other commitments or to seek to give those other commitments priority over the appellants' claim. The contract of November 7 contains no reference to other contracts or to other commitments. Such other commitments were of no concern to the appellants."

It must be remembered, however, that so far as appears from the report, there was nothing in the nature of a frustrating event in *Hong Guan* v. *Jumabhoy*. Nor indeed was it a true case of prorating,[32] which in essence requires that like cases be treated alike. In *Hong Guan* the respondents were seeking to give certain binding contracts an absolute priority over what the Council Board held to be another binding contract. On this view *Hong Guan* would seem to throw no doubt either upon the use of the principle of prorating as an aid to the construction of exemption clauses in appropriate cases or to its extension, on the reasoning suggested by Corbin,[33] to

[26] *Ibid.* at p. 700.
[27] *Ibid.* at p. 699. An example of an attempt to widen the protection of an exclusion clause in fact producing the opposite effect.
[28] *Ibid.* at pp. 699–700.
[29] *Ibid.* at p. 701.
[30] *Ibid.* at p. 700.
[31] *Ibid.* at pp. 701–702.
[32] It is, however, of interest to note that counsel for the appellants suggested at p. 690 that one possible construction of the exemption clause was that the respondents should use due diligence to ship and if, after having used such diligence, they still lacked a full supply, then they were bound to give the appellants a proportionate share. The respondent apparently made proportionate delivery on a number of other contracts. See pp. 697 and 702.
[33] *Supra.*

cases where there is no express exemption clause but partial frustration had occurred.

The adoption of prorating would leave a number of important subsidiary problems to be solved. The first is the basis upon which distribution should be made. The Uniform Commercial Code in section 2–615 (*b*) gives the supplier a wide discretion, allowing allocation to be made on any basis which is fair and reasonable.[34] On the other hand Lord Finlay in his dissenting speech in *Tennants v. Wilson* suggested that contracts should take priority in accordance with their delivery dates, those with the earlier dates being performed in preference to those with the later, *pro rata* distribution only taking place when there were several contracts with the same delivery date.[35] No other member of the House referred explicitly to this problem, but Lord Haldane in saying that the appellants " were either bound to all their customers equally or they were not bound to any of them " [36] and Lord Wrenbury in his analogy with insolvency [37] seem implicitly to reject Lord Finlay's approach. It may be that Lord Wrenbury's analogy is a better guide than Lord Finlay's application of *qui prior est tempore potior est jure*. In insolvency all creditors, whatever the repayment dates of their debts, are placed on an equal footing, subject to special categories of preferred and deferred creditors. The catastrophe supersedes any priority of time in the original transaction and all share on an equal footing in the distribution of a dividend.[38] Fixed dates of repayment, and delivery, may be regarded as based on the assumption that there will be enough for all and when this fails the dates fall with it, allowing all to share in what can be salvaged regardless of original temporal priority. This seems to be the accepted American view for proration [39] and appears to have much to commend it in that distinctions between the delivery dates of different contracts may be very narrow and based on fortuitous and arbitrary considerations which should not operate to give one party an absolute priority over another. Thus a customer may have asked for his delivery date to be postponed because there were heavy calls on his storage space or the like. It would not seem reasonable that such a customer should be called upon to rank behind another who had taken an earlier delivery date just because his storage space would be free or his sub-purchasers required earlier delivery in their turn. Furthermore, both Corbin and the Uniform Commercial Code stress that a supplier prorating may set aside allocations for regular customers not under contract at the time when the shortage

[34] For text see *supra*, note 6.
[35] *Supra*, note 17 and 18.
[36] [1917] A.C. at p. 512.
[37] *Supra*, note 16.
[38] See Bankruptcy Act, 1914, ss. 30 and 33.
[39] See *Corbin on Contracts*, Vol. VI, at pp. 418–415; Official Comment 11 to U.C.C., s. 2–615 (*b*).

occurred.[40] This seems reasonable, but it is hard to see how this could logically be done if Lord Finlay's temporal sequence were adopted as the basic rule. As the supply is short the earlier contracts will absorb the supply leaving nothing for the later. If allowance were then made for regular customers not under contract this would mean preferring persons without contracts to some with contracts, which seems absurd. It is one thing to treat some persons without contracts on an equal footing with those who have contracts. It seems quite another to give those without contracts a priority over some who have contracts.

Apart from this question of preserving the good will of regular customers, Corbin suggests that there may be other cases where, to pursue the analogy with insolvency, a customer may be regarded as being in the nature of a preferred creditor. Thus in a shortage of heating materials it is suggested that a hospital may be preferred to an hotel, a home to a factory.[41]

Pursuing the analogy further, there may be fraudulent preferences in prorating as in insolvency. Corbin points out that if the supplier makes further contracts with other parties, after the operation of the partially excusing factor, in order to take advantage of increased prices resulting from shortage, these contracts must be ignored in the distribution.[42] The Comment to the Uniform Commercial Code says of section 2–615 (*b*) that contracts made with regular customers after the operation of the frustrating event may be made at increased prices, but that care be exercised in making allocations when prices have increased and that " in case of doubt his contract customers should be favoured and supplies prorated evenly among them regardless of price. Save for the extra care thus required by changes in the market, this section seeks to leave every reasonable business leeway to the seller." [43]

The buyer is not obliged to take the quota under either the *Restatement* [44] or the Uniform Commercial Code [45] and Corbin's suggestion that as exemption clauses are to be construed as being for the protection of the seller it therefore follows that the buyer is normally bound to take the allocation [46] would seem to run counter to the stress which has so frequently been placed in this country on the application of the *contra proferentem* [47] rule to the interpretation of these clauses and thus may not be a reliable guide.

[40] Corbin, *op. cit.* p. 414; U.C.C., s. 2–615 (*b*). See *supra*, note 6. This would be to preserve goodwill. The importance of preserving this was recognised by English courts in the mitigation case of *Finlay* v. *Kwik-Hoo-Tong* [1929] 1 K.B. 400.

[41] See Corbin, *op. cit.* Vol. VI, p. 415.

[42] *Ibid.* at p. 414.

[43] See citation and discussion in Hawkland, *Transactional Guide to the Uniform Commercial Code*, Vol. 1, pp. 220–221.

[44] See McElroy and Williams, *op. cit.*, at p. 25.

[45] *Supra*, note 43, and U.C.C., s. 2–616.

[46] See Corbin, *op. cit.* Vol. VI, p. 411.

[47] Recently reaffirmed in the House of Lords in *Suisse Atlantique* v. *N.V. Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361 at pp. 398–399, 426–427. See also Bramwell B. in *Jackson* v. *Union Marine Insurance Co.* (1874) L.R. 10 C.P. at pp. 144–145: " The exception is an excuse for him who is to do the

The final important subsidiary rule suggested in Corbin is that in the event of a supplier failing to deliver an allocation in a case of partial frustration the measure of damages should be the difference between the value of the customer's quota on a reasonable distribution and the value of any quantity which has in fact been delivered to him, together with the amount of any foreseeable consequential losses.[43] This does not seem open to objection.

The meagre amount of English authority on the problem of prorating is probably to be explained by the general prevalence of exemption clauses which make express provision for many, if not all, of the questions which would arise in practice. If the efficacy and scope of exemption clauses are limited by reforming legislation it may be that prorating will give rise to more frequent problems before the courts and American discussion and experience seem to point the way to solutions more satisfactory than some of those which could be derived from such English authority as there is.

A. H. HUDSON.*

act and operates to save him from an action and makes his non-performance not a breach of contract, but it does not operate to take away the right the other party would have had, if the non-performance had been a breach of contract, to retire from the engagement . . . if one party may, so may the other."

[43] Corbin, *op. cit.* Vol. VI, p. 415.

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REPORTS OF COMMITTEES

Royal Commission of Inquiry: Compensation for Personal Injury in New Zealand

In September 1966, a Royal Commission was set up in New Zealand to inquire into the law relating to compensation and claims for damages for incapacity or death arising out of accidents (including diseases) suffered by persons *in employment*. Some may therefore be surprised by the title of the Report which the Royal Commission, arguably going beyond its terms of reference,[1] produced in December 1967. The explanation is a simple one. The three-man Commission, chaired by Woodhouse J., reached the conclusion that it was "impossible to resolve the problems of industrial injuries in isolation." Far from merely tinkering with the employee's right of action at common law, or toying with absolute liability, or recommending minor improvements to the Workers' Compensation Act 1956, the Royal Commission boldly recommends a comprehensive social insurance scheme providing "immediate compensation without proof of fault for every injured person, regardless of his or her fault, and whether the accident occurred in the factory, on the highway, or in the home." The negligence action for personal injuries should be abolished, and the 1956 Act repealed.

Plainly, so radical a solution of the problem of adequately compensating the injured demands a careful evaluation not only in the land of its origin but in other common law countries. Whether Parliament will give effect to the scheme in New Zealand is very doubtful. The Government has been non-committal; the Law Society seems likely to be a vigorous opponent; the unions and the insurance companies are violently opposed; and no organised group is championing it. In default of better arguments, its opponents will ask the question: "who wants it?" If this is a fair assessment of the state of public opinion, it is important that the Report should receive as much unbiased discussion as possible.

The Commission would have been prepared to see the various categories of injury tackled separately, first industrial injuries, then those caused in road accidents, and then, at some future date, all others, had not a comprehensive scheme seemed practical. But we are assured in the Report that a scheme compensating injuries, at whatever time of the day they may occur, and whatever their cause, *is* practical.

The common law remedy for negligence is condemned on several counts. First, the adversary system is said to hinder the rehabili-

[1] Should the clause "associated matters that the Commission may deem to be relevant to the objects of the inquiry" have been construed *ejusdem generis* with the earlier clauses, in which the phrase "in employment" appears four times?

tation of injured persons after accidents,[2] while playing no effective part in preventing them. Any compensation scheme must serve the goal of complete rehabilitation, which is a consideration of " overriding importance." This is stressed again and again in the Report. Secondly, the fault principle cannot be used to justify the common law remedy,[3] and is erratic and capricious in operation. Thirdly, this remedy produces " a complete indemnity for a relatively tiny group of injured persons; something less (often greatly less) for a small group of injured persons; for all the rest it can do nothing." Fourthly, it is cumbersome, inefficient and extravagant. Finally, it does not meet the five requirements of a satisfactory compensation scheme specified by the Commission.[4]

Its criticism of the Workers' Compensation Act 1956 (derived from an Act of 1900, which was modelled on the Workmen's Compensation Act 1897 (U.K.)) forms an essential part of its reasoning. Maximum weekly payments here are $28–75 for a single worker, and the Act, contravening ILO Convention No. 121,[5] fixes six years as the maximum period over which payments (usually commuted into a lump sum) may extend. There will be no disagreement with the view that these restrictions mean that the compensation payable in cases of total disability is artificially low. Moreover, the Act gives rise to far too many demarcation problems: exactly who are squeezed out by the definition of " worker "; what accidents arise " out of and in the course of the employment "? A fundamental flaw is that compensation rates depend on the severity of injury, without reference to the question whether loss in earning capacity is associated with it. Moreover, payments are levelled out. The man with a small injury does comparatively well; the man with an injury which will ruin his life is fobbed off with a paltry sum, and with nothing in respect of the seventh and subsequent years of his incapacity, even if total.

We should, says the Commission, make a clean break with this system and its adversary techniques. An independent agency of government should handle a comprehensive loss-sharing scheme. Private enterprise should be banished from the arena. This would

[2] Possibly true, but if facts be thought necessary to support this proposition, it remains not proven. It is also hard to accept the Commission's view that the workers' compensation system can really do " nothing " in the field of physical and vocational restoration of the injured. As a practical necessity, injured workers are compelled to obtain a medical certificate without delay after an accident. No doctor narrowly confines himself to the compensation issue.

[3] An argument which is more easily advanced in New Zealand, where personal injury actions are tried with juries, and sympathy verdicts tend to dilute the requirement that fault be proved.

[4] (1) Community responsibility; (2) comprehensive entitlement, *i.e.*, that injured persons should not be treated in different ways depending upon the cause of the injury—this is said by the Commission to " follow automatically " from (1), but does it?; (3) complete rehabilitation; (4) real compensation, *i.e.*, " a realistic assessment of actual loss, *both physical and economic*, followed by a shifting of that loss on a suitably generous basis "; and (5) administrative efficiency.

[5] Employment Injury Benefits 1964, Art. 9 (3).

reduce the costs of administration and avoid the duplication of organisation which is inevitable when there are sixty-two individual companies operating. With respect, this part of the Commission's Report is extremely convincing. Why, given the drastic limitations of workers' compensation, have the unions not even agitated in the past for improvements? Because, I suspect, they forgive (and will continue to forgive) all if their members are allowed to bring an action at common law with its entrancing vision of a pot of gold. What they forget is that only a small proportion of their members will be able to prove negligence or a breach of statutory duty. It is far from obvious why the success of a few (spectacular it may be *if* they are acquitted of any contributory negligence) justifies the relegation of the remainder to the untender mercies of the Workers' Compensation Act.

The Commission also notes the absurdity of double compensation, first at common law, or by way of lump sum under the Act, and secondly through social security—two systems operating independently and in enforced disregard of each other.[6] It rejects, however, the submission put forward by the Social Security Department that there should be a basic and uniform level of compensation for all, supplemented by means-tested economic and dependants' allowances. There must rather be "an assurance of *income-related* social security."[7]

The general basis of entitlement under the proposed scheme would be "bodily injury by accident which is undesigned and unexpected so far as the person injured is concerned," excluding incapacities arising from sickness or disease. The International Classification of Diseases[8] is referred to by the Commission as a convenient way of distinguishing the injury conditions which should qualify from those which should not. This is an interesting new departure, but if and when it comes to drafting legislation this classification could hardly be incorporated by reference and one wonders rather uneasily whether the formula which is adopted, whatever it is, will give rise to a series of demarcation problems just as acute as those which can arise at present under the Workers' Compensation Act. Exceptionally, it is recommended that certain work-connected industrial diseases should be covered—in deference to the *status quo*. This part of the report is disappointingly brief. The Commission asks that a medico-legal study group be set up to study the problems of the boundary. One wishes that the

[6] The Law Reform (Personal Injuries) Act 1948, s. 2, permits half the value of benefits received under the National Insurance (Industrial Injuries) Act 1965 (U.K.) to be brought into account against loss of earnings in a common law action. If this is anomalous, it is much less anomalous than a system whereby overlapping payments are made under two separate *statutes*.

[7] Report, para. 278, quoting from a U.K. Commons speech by the Rt. Hon. Douglas Houghton H.C.Deb. Vol. 701, col. 872 (1964). Emphasis added.

[8] *Manual of the International Statistical Classification of Diseases, Injuries and Causes of Death*, WHO, Geneva (1957), p. 243.

Commission had itself had the time to delimit the contingencies to be covered with some precision. As it is, the Report is open to the criticism that what it treats as details for the future to resolve *may* constitute quite major difficulties with the whole scheme. Since questions of " law " (whatever these may turn out to be) may go to the Supreme Court, according to a separate recommendation of the Commission, it is hardly clear that the administration of the scheme will be as efficient and un-" legalistic " as the Commission would have it.

Of its very detailed recommendations about the calculation of benefits, probably the most significant are that automatic compensation should be the equivalent of 80 per cent. of lost income for periods of total incapacity (to give a margin for personal initiative in rehabilitation); that assessments must " give all reasonable doubts in favour of the applicant ";[9] and that compensation should generally be made by periodic payments which could be adjusted upwards, but never downwards, when circumstances change; that they should be automatically adjusted at two-yearly intervals in order to meet changes in the cost of living; and that the ceiling should be fixed at the very generous figure of $120 per week. Most people would thus collect their whole 80 per cent. What about lump-sum awards? Minor permanent disabilities should be compensated in that way, says the Commission, and there should also be a discretion to commute periodic payments, apparently in all cases, " where the interests or pressing needs of the person concerned clearly would warrant this." We are unfortunately not told what principle, if any, would govern the exercise of this discretion by the Board which would have ultimate appellate jurisdiction and preside over the administration of the scheme. Would it ultra-paternalistically make its own estimate of an applicant's interests, or would it regard him as entitled to manage his own financial affairs and make his own decision? This is no theoretical dilemma, since it is all too likely that almost everyone will choose to receive a lump sum if he can get it.

The scheme should be compulsory: no " contracting out " would be permitted. Its present cost is estimated at $88 million. The funds required should be provided by insured employers contributing at the rate of 1 per cent. of all wages and salaries; by self-insurers and motor-vehicle *owners* making much the same contribution as they make at present; by a slightly increased contribution from the Government; and by looking to two at present non-contributing groups, *viz.*, (1) the self-employed and (2) motor-vehicle *drivers*, who would be required to pay an annual levy of $1–50 when obtaining their driving licences. These sources would provide a total of $41·8 million. Considering the comprehensiveness of the

[9] To appear in the statute (if so, unique?) or to be left as a standing administrative directive?

proposed coverage, the total extra cost involved, a mere $5·2 million, is almost unbelievably small. The estimated saving in administrative expenses partially accounts for it; the other main reason is that there would be a limitation of $25 on the weekly compensation rate during the first four weeks of a man's incapacity.[10] Prima facie, then, what is proposed certainly meets the practical requirement of cost, and does it without any obviously inequitable allocation of the load—if we except the insurance companies' loss of business.

As regards the very important topic of safety and rehabilitation, space permits us to note only a few of the points made by the Commission. It endorses the measures promoted in Sweden by the Joint Industrial Safety Council. Union-employer collaboration over safety measures in factories will, it thinks, be easier if adversary methods of dealing with industrial accidents are removed. It firmly holds, too, that a system of merit or experience rating is ineffective as a means of promoting safety. It records its glowing approval of the Ontario system whereby the Medical Director of the Workmen's Board and his staff keep in close touch with doctors throughout the province concerning treatments. This pattern should be emulated in New Zealand, and $200,000 should be set aside annually for the purposes of rehabilitation.

From the objective viewpoint which it is fondly imagined is one's own, it is difficult to find any really damaging criticisms to level at the Report, breath-taking as its proposals are. As a fact-finding body it was not very successful. We are no nearer to a sociological evaluation of lump-sum awards than we ever were.[11] We still have no clear idea of the extent of insurance companies' profits, or of the slice of the damages cake that goes in legal costs, or of the incidence or significance of voluntary payments made by employers—which in *some* cases convert compensation received into a complete indemnity against loss of income during incapacity. With respect to the gaps in the information supplied to it, it is appreciated that some facts were impossible or extremely difficult to obtain. The submissions presented to the Commission might have been more informative: too many were confined to unsupported generalisations, and to dubious value-judgments based on them. One must protest, however, about the Commission's occasionally rather dubious use of statistics. For instance, its analysis of 864 common law actions commenced in the Wellington Supreme Court in 1962 and 1963 seems unsatisfactory. Sixty-one were brought to trial, and the plaintiff

[10] In addition, as the Royal Commission notes, there would be several important indirect savings, *e.g.*, the cost of unsuccessful litigation; the cost of all present public liability insurance; some part of the personal accident policy premiums presently paid; and voluntary sick payments presently made by employers.

[11] Are they sometimes squandered? Does a once-for-all payment eliminate anxiety neurosis? Conversely, do the delays of litigation tend to increase same? That law reform should proceed on adequate sociological bases is a principle more honoured in the breach than the observance.

succeeded outright in only twenty-two of them. These figures do not *in themselves* demonstrate the inadequacy of common law actions, as is claimed. A much more searching analysis was called for here, including investigation of the adequacy of the figures at which a high proportion [12] of the remaining 808 actions were compromised. It is implied that a plaintiff who settles his case receives less than adequate compensation for his losses, but common experience suggests that plaintiffs do by no means badly. To examine only the " thin " and the intractable [13] cases actually taken to a hearing really distorts the picture. The Commission's arguments for the abolition of the right of action at law nevertheless seem to be sufficiently strong to carry its conclusion, without recourse to statistical arguments.

The Royal Commission is indeed to be congratulated on its boldness. It has, of course, tailored the solution which it offers to the New Zealand scene, most noticeably so in its estimate of income and expenditure. But the philosophy of the Report may be exportable. Would it be too much to say that its acceptance in the United Kingdom would lead to benefits both more equitable and more generous than those available under national insurance? Three final questions: is it not inescapable that all injuries resulting in loss of production should be a community responsibility? If so, what conceivable purpose is served by distributing losses *through* employers and the owners of motor-vehicles? If the real aim at present is to reach insurance funds, why not institute *one* insurance fund and let claims be made on it directly? If we reach that point in our thinking, as the Woodhouse Commission has, the principal remaining problems will be how the cost of raising the fund will be distributed, and how its benefits will be allocated and administered. As for the narrowing of the role of the tort of negligence, this is likely to be a cause of academic rejoicing. Left to compensate property and pecuniary losses, its principles will more closely correspond with those actually applied by the courts.

D. L. MATHIESON.

[12] The insurance companies' submissions indicated that 25 per cent. of claims are abandoned.

[13] i.e., where the gap between the two medical prognoses proves unbridgeable.

NOTES OF CASES

The Labour Injunction in Scotland

The disease of the "labour injunction" appears to have spread to Scotland. This important new outbreak makes desirable at least an abbreviated account of *Square Grip Reinforcement Ltd.* v. *Macdonald*.[1]

The plaintiff company, one of seven companies in a group, manufactured steel reinforcement materials, used mainly for building sites. It insisted on "direct negotiation" with its employees through its own works committees and, though it permitted workers to join them, it refused to negotiate with or recognise trade unions. It made all this clear in each worker's manual of employment conditions. After great dissatisfaction over conditions of employment, some 70 per cent. of the workers joined the union (T.G.W.U.) of which the defendants were officials. After abortive attempts to secure recognition in which the Ministry of Labour's conciliation officers played a part, the defendants made a list of demands (for recognition of the union and its shop stewards; for a procedure agreement on disputes; and for negotiation over wages and other conditions) saying that if these were not met in full there would be a strike, the company would be "blacked," and other union officers and the T.U.C. so informed. The company refused to negotiate, whereupon fifty-eight of its seventy employees withdrew their labour. Soon afterwards, various T.G.W.U. officials (including the defendants) attended at building sites where contractors known to be customers of the plaintiff company worked. Employees of the customers refused to off-load steel supplies from the plaintiffs so that the customers were forced to refuse delivery of those materials. There was also evidence in at least one case of a threat to a customer's management that if supplies were accepted their workers would then strike. In confirming the interdict against the defendants for inducing breaches of the commercial contracts, Lord Milligan, in a prolix judgment, may be said to have touched mainly on the following points:

(*a*) *The breach*

The customers were in breach because it was their obligation to off-load the lorries under the contracts of supply made with Square Grip. There was, it is true, a clause in the contracts which allowed Square Grip to cancel in the event of a strike; but even the customers could not avail themselves of that clause as it was

[1] 1968 S.L.T. 65 (Outer House) (No. 2). An interim interdict had been earlier granted *ex parte* and continued by Lord Avonside: 1966 S.L.T. 292. In this action Lord Milligan granted a final interdict.

worded. So, *a fortiori*, it could not help the defendants.[2] This type of clause, giving one party or both parties to the contract an *option* to terminate (as was also the case in the *Emerald* contract), must, of course, be sharply distinguished from any clause or factor which prevents there being a contract or a breach at all. Breach is a critical part of the tort and where " there is not a contract the breach of which he could procure," the defendant cannot be liable however much he induced anyone to do it.[3] Here, however, the breaches were established.

(*b*) *Knowledge and intention*

Lord Milligan found as a fact that the defendants " all knew that the firms referred to on record were customers of the petitioners and that the materials were being sent to the customers in furtherance of contracts "; and " although they did not know the terms of the contracts. . . . they all realised, or in any event must have realised, that blacking would injure the petitioners and would cause a breach of contract." [4] In such a situation the necessary mental element is proved, unless the defendants can positively prove an intention *not* to cause breaches of contract, as in *White* v. *Riley*.[5]

(*c*) *The inducement*

In regard to those customers where officials had directly approached a customer's management, there had clearly been a *direct* inducement of breach and the tort was thereby established. But in most cases the officials had only informed the customer's workmen (union members) of the position, though they knew that such workers had offered to black the plaintiff's materials to help their fellow workers at that company. They had no authority to instruct these workers not to unload but they could " exhort and persuade them not to do so "; and they were all " anxious to do what they could to coerce the petitioners " into recognising the union. In considering whether a person has induced another to do something, Lord Milligan went on, their relative positions must be considered; and where one was " desperately anxious " to achieve a result even a " suggestion " coming from him would suffice. So it was here.[6]

[2] *Ibid.* p. 71.
[3] *McManus* v. *Bowes* [1938] 1 K.B. 98 at p. 127, *per* Slesser L.J. (contract determinable by inducee at will); so too *De Francesco* v. *Barnum* (1890) 45 Ch.D. 430 (infant's contract void; no tort). See too Morris L.J. in *Thomson* v. *Deakin* [1952] Ch. at p. 702: " If the contract . . . is lawfully terminated, then there is no violation." Nothing said in the *Emerald Case* [1966] 1 W.L.R. 691 concerning a " heedless " or " reckless " state of mind can affect this point, for where no *breach* is proved the tort cannot be constructed out of mere subjective elements. [But see now *contra*, Stamp J., *Torquay Hotels* v. *Cousins* [1968] 3 All E.R. 43, noted *post*.]
[4] 1968 S.L.T. at p. 72.
[5] [1921] 1 Ch. 1, especially *per* Warrington L.J. at p. 26.
[6] 1968 S.L.T. at pp. 72 and 73.

It will be recalled that in *Thomson* v. *Deakin*,[7] warnings of the blacking given to the employers (there the plaintiff's suppliers) were treated as a mere " statement of the facts " or " advice." If the tests used in *Square Grip* are applied it is difficult to see how such information can ever be imparted by union officials to a firm's management without it amounting to persuasive procurement. Even more alarming, it is difficult to see how, on such tests, union officials are able to do what has been done for decades—namely, inform their members that a company is " black " and in dispute with the union—without the risk of being liable for " inducing " whatever these members chose to do. Again, in *Thomson* v. *Deakin* Jenkins L.J. was insistent that " general exhortations issued in the course of a trade dispute such as ' Stop supplies to X '; ' Refuse to handle X's goods ': ' Treat X as black ' and the like " were not necessarily wrongful inducements because their object might be achieved by lawful means. Also, as the Court of Appeal decided, in indirect inducement, where A is striking at the contract between X and Y by persuading B (usually X's servant) to take action, it must be shown that B's act is wrongful before A can be made liable to Y. And it must be shown that the breach between X and Y is a " necessary consequence " of the act A induces B to do.[8]

None of these points is adequately dealt with by Lord Milligan. He appears to assume that the workers on the sites would have been in breach of their employment contracts, and rejects the idea that they acted " spontaneously." But since he later finds that there was a trade dispute in existence, his failure then to investigate the effect of the first limb of section 8 of the Trade Disputes Act 1906 [9] is odd. In truth, one passage suggests that he was persuaded that a section of Lord Pearce's speech in *Stratford* v. *Lindley* [10] affects the authority of *Thomson* v. *Deakin*. Counsel for the respondents does not appear to have replied properly to the point.[11] In *Stratford*, the majority of the Law Lords undoubtedly treated the facts before them as *indirect* inducement (defendants persuading customers' workmen to leave barges, thereby bringing about breach of the plaintiff's contracts with customers). But Lord Pearce (with whom Lord Donovan expressed general agreement) treated the case as one of *direct* inducement by reason of the letter

[7] [1952] Ch. 646 at pp. 685–686, *per* Evershed M.R. (there was no " pressure, persuasion or procuration " of the suppliers).

[8] [1952] Ch. 646, *per* Jenkins L.J. at p. 697 and at p. 696. See too Evershed M.R. at pp. 681–682 and p. 687; Morris L.J. at p. 702. See the previous note of which this note originally formed the second part, on *Daily Mirror Ltd.* v. *Gardner* [1968] 2 W.L.R. 1289 (C.A.) in (1968) 31 M.L.R. 440, especially at pp. 442–445.

[9] Rendering acts done in furtherance of a trade dispute not actionable on the ground only that they induce breach of a contract of employment. See *infra*, n. 14.

[10] [1965] A.C. at p. 888.

[11] See 1968 S.L.T. at p. 73 (where the confusion of instances of direct and indirect inducement is most marked).

sent by the union defendants to the customers via their trade association. The defendants, he says,

> " made it clear to the association . . . which in effect represented the hirers [the customers] . . . that the hirers could not return the barges to the plaintiffs. The fact that an inducement to break a contract is couched as an irresistible embargo rather than in terms of seduction does not make it any the less an inducement."

Therefore, when Lord Pearce comes to causation, he naturally holds that it is enough in this case of direct inducement if the defendants intended to procure a breach and did so as " a reasonable consequence " of their acts. But he adds very carefully:

> " *Thomson (D. C.) & Co. Ltd.* v. *Deakin* was a somewhat different case from the present. In that case: ' There never was any direct action between the defendants . . . and Bowaters [the suppliers] with the object of persuading or causing Bowaters to break their existing contracts with the plaintiffs ' (*per* Upjohn L.J. [1952] Ch. 646 at p. 662). In a case where the defendant does not communicate any direct pressure or persuasion to the contract-breaker but merely procures indirectly a situation which causes the breach *I am inclined to agree with the dictum of Jenkins L.J.* that it must be shown that breach of the contract . . . ensued as a necessary consequence. . . . But that is not this case." [12]

Thus, so far from casting doubt on *Thomson* v. *Deakin* (as Lord Milligan seemed to think) Lord Pearce in *Stratford* inclined to agree with it, though he distinguished it.[13] *Thomson* v. *Deakin* is not mentioned by any other Law Lord.

It is submitted therefore that Lord Milligan's judgment diverges from the law of England in so far as it fails to distinguish direct from indirect inducement of breach of contract. That is not to say that the defendants might not anyway have been found liable in *Square Grip*; for they may well have engaged in wrongdoing sufficient to make them liable for indirect inducement of breach of the supply contracts (although the better view is that inducement of breaches of *employment* contracts does not constitute such wrongdoing in furtherance of a trade dispute by reason of section 8 of the Trade Disputes Act 1906).[14] But on the correct premises

[12] [1965] A.C. at p. 833 (italics added).

[13] The fact that Lord Pearce treated *Stratford* as a case of direct inducement is also proved by the fact that he found it unnecessary to decide whether the customers' workers acted in breach of their employment contracts (p. 835). Whereas the finding that they had so acted was fundamental to the other Law Lords' speeches, resting upon indirect inducement or breach of the hiring contracts.

[14] That was the view of Lord Denning M.R. in *Morgan* v. *Fry* (C.A. 1968; as yet unreported). For other judicial support for this view see Lord Denning M.R. and Salmon L.J. in *Stratford* v. *Lindley* [1965] A.C. at pp. 285, 306–305; the reasoning of Lord Devlin in *Rookes* v. *Barnard* [1964] A.C. at p. 1211 (see (1965) 28 M.L.R. at p. 211) and Upjohn J. in *Thomson* v. *Deakin* [1952] Ch. at pp. 662–663. *Contra*: Evershed M.R., *Thomson* v. *Deakin* [1952] Ch. at p. 687; Lord Pearce, *Stratford* v. *Lindley* [1965] A.C. at p. 836.

Lord Milligan would surely have argued his judgment differently; for he criticises the *defendants* for not calling the customers' workers to give evidence about their alleged "spontaneous" acts,[15] whereas the burden was surely on the *plaintiffs* to prove (in the instances of *indirect* inducement) that these workers acted wrongfully. Certainly, however, Lord Milligan must be right when he decides that the second limb of section 8 of the Trade Disputes Act 1906 cannot protect defendants against whom there is proved the tort of inducing breach of commercial contracts.[16] To the authority which he cites should be added *Rookes* v. *Barnard*, where their lordships decided that this part of the section applied only to "interference" which was not tortious, thereby (as Lord Evershed said) rendering this part "nugatory."[17] As interpreted, the section (like the Act of 1965) has no bearing on breach of commercial contracts.

Since the above was written, the Report of the Donovan Commission has been published.[18] A fuller note on that Report will appear later; but three interim points may be made about its recommendations relevant to the *Square Grip* case. First, the Report itself accepts that the *Thomson* case is good law and that *indirect* inducement of a breach of contract is not unlawful if "no unlawful means have been counselled or used."[19] The odd suggestion recently repeated by commentators that by reason of the Stratford decision we have now reached "the end of the road for a puzzling distinction, first made in *D. C. Thomson & Co. Ltd.* v. *Deakin* [1952] Ch. 646, between a 'direct' and 'indirect' inducement of a breach of contract,"[20] is certainly not accepted by the eminent authors of the Report (including Lord Donovan himself).

Secondly, the Report accepts the view that, in order to restore the balance of liberty for industrial action, it is necessary to amend the Trade Disputes Acts 1906 and 1965, so as to protect, in trade disputes, inducements of the breach of any contract (not merely,

[15] 1968 S.L.T. at p. 74.

[16] An act in furtherance of a trade dispute is not to be actionable on the ground only that it is "an interference with the trade, business or employment of some other person. . . ."

[17] [1964] A.C. at pp. 1192, 1195. See too Lord Pearce at p. 1236.

[18] Royal Commission on Trade Unions and Employers' Associations, Report (1968 Cmnd. 3623, H.M.S.O.)

[19] *Ibid*, para. 981 (5). See too para. 991 (4).

[20] See Guest and Hoffman, (1968) 84 L.Q.R. 310 at p. 311. The same authors state at p. 312 that in the *Stratford* case "only Lord Upjohn . . . showed any interest in whether the means used were unlawful in themselves." Reference to [1965] A.C. at pp. 325, 327–329, 342 *per* Lord Reid, Viscount Radcliffe and Lord Donovan shows that each of them referred to the use of unlawful means and, no doubt for that reason, found it unnecessary even to mention the *Thomson* case, as it was obviously to be distinguished on that ground. As for Lord Pearce's view, see notes 12 and 13 and relevant text *supra*. One reason why the distinction between "direct" and "indirect" inducement is not "puzzling" was explained in the earlier note (1968) 31 M.L.R. at p. 445.

as now, contracts of employment).[21] Clearly, after cases such as *Square Grip*, such amendment is essential to preserve the most elementary right to organise strikes or other types of activity hitherto available to groups of British working people. On the other hand, a majority of seven Commissioners wish to restrict the protection of the amended section 8 to trade unions, employers' associations, and persons "acting in an authorised capacity on behalf of a registered trade union or employers' association."[22] The arguments of the minority of five against this restriction carry, it is suggested, the greater weight.[23] Thirdly, the *Square Grip* decision illustrates one of the many ways in which Chapter XIV of the Report has failed to take account of the new tendency on the part of at least some members of the judiciary to develop the common law in ways which have effects inimical to rights which have been considered for decades basic trade unions rights. Thus, the Commissioners, in sanguine mood, say in their discussion of this tort:

> "(1) Mere advice is not inducement (of a customer) . . . (2) Such advice will not constitute an inducement to break a contract even if it calls attention to the possible dangers for the customer of continuing to deal with the employer in dispute."[24]

Lord Milligan was ready to call any suggestion or advice an "inducement" if the defendant was "desperately anxious" to achieve a given result. In the *Stratford* case, the Law Lords clearly were ready to give a wide scope to the term. It seems a pity that the Donovan Report does not, at the minimum, explicitly recommend that the judges should by statute be compelled to accept the legality of communications from a trade union by way of both information to its members about disputes with employers and warning or advice to customers or suppliers of the employer in dispute. *Square Grip* (amongst other cases) shows that such a statute is urgently required to preserve the traditional balance of strength in collective bargaining.

K. W. WEDDERBURN.

INDUCING BREACH OF CONTRACT WITHOUT THE BREACH

THE Cinderella of the modern law of torts [1] is, almost daily, becoming more complex. The judgment of Stamp J. in *The Tor-*

[21] See paras. 878–894.
[22] The quotation is from Lord Tangley's "Supplementary Note" at p. 287, the only place where the proposal is spelt out with clarity as regards "authorised agents." See the main Report paras. 488, 800–803, and 894.
[23] See especially the brief but convincing comments of para. 804, which goes some way to explaining the gravity of the majority proposal.
[24] *Ibid.* para. 891.
[1] Street (1968) 31 M.L.R. at p. 357.

quay Hotel Co. Ltd. v. *Cousins and Others* [2] is the most recent and most creative addition to what is fast becoming a long line of modern authority. The case is another example of the so-called "Labour Injunction" at work; it was a motion to continue an *ex parte* injunction awarded by Plowman J. and was argued on the basis of affidavit evidence. Such cases [3] apparently never reach full trial proceedings and although described as only interlocutory [4] the judgments inevitably decide matters of great legal and practical importance.

The Torquay Hotel Co. Ltd., owner of the Imperial Hotel at Torquay, through its membership of an hoteliers' association entered an agreement in 1947 with the National Union of General and Municipal Workers (N.U.G.M.W.) and the Union of Shop Distributive and Allied Workers (U.S.D.A.W.) for the regulation of working conditions and wages. At all material times there also existed a Joint Trade Union Committee in the catering industry. The N.U.G.M.W., the U.S.D.A.W. and the defendant T.G.W.U. were represented on this committee. Before November 1967 the arrangements [5] of this committee excluded the defendant union from organising employees in residential hotels. In spite of these arrangements and probably because of the lack of activity by either the N.U.G.M.W. or the U.S.D.A.W. the defendant union had, since November 1966, made some ground in organising labour in the Torquay area. At a later stage, because its powers of organising the catering industry were to be even further restricted, the T.G.W.U. resigned from the committee.

By January 1968, catering membership of the T.G.W.U. in the area was large enough for it to set up a Torquay branch. Approaches were then made to the Hotels Association concerning recognition of the T.G.W.U. in the Torbay area and to Mr. Smith, managing director of the Torbay Hotel. Mr. Smith refused to meet with the defendant union, saying that he was already negotiating with the N.U.G.M.W. After the views of the T.G.W.U. members in the area had been ascertained the branch committee decided to invoke industrial action. The Torbay Hotel was picketed and within a few days "was brought to a standstill." [6]

[2] [1968] 3 All E.R. 43; The other defendants were national, regional, district and local representatives of the union and the Transport and General Workers Union (T.G.W.U.).

[3] *e.g.*, *J. T. Stratford & Son Ltd.* v. *Lindley* [1965] A.C. 269.

[4] ". . . I must emphasise that although the matter has been the subject of argument extending over many days, I am dealing with an interlocutory application and my findings of fact and conclusions of law depending on the facts can be no more than provisional": [1968] 3 All E.R. at 48.

[5] *Cf. Spring* v. *N.A.S.D.S.* [1956] 1 W.L.R. 585, defining analogous arrangements "as being a morally binding code of conduct made between persons of similar views": *per* Sir Leonard Stone V.-C. at p. 592, *i.e.*, non-contractual. See Wedderburn, *Cases and Materials on Labour Law*, p. 267 *et seq.*

[6] [1968] 3 All E.R. at 51.

Mr. Chapman, manager of the Imperial Hotel, was reported in the local Press to have said " that the Hotel Association was determined to stamp out " the intervention of the defendant union into the hotel trade. The inflamed branch members saw this as an attempt by Mr. Chapman to " bring the union into discredit " and to involve the management of the Imperial Hotel in the dispute.[7] Pickets were immediately posted at the Imperial Hotel.

The plaintiff brought an action for inducing breach of contract, interference with contract, conspiracy and intimidation. The court granted injunctions in relation to inducing breach of contract and picketing at the Imperial Hotel; the learned judge dismissed one claim for intimidation and found it unnecessary to make any finding in relation to alternative claims of conspiracy and intimidation.

Space permits only a limited discussion of some of the issues raised in the judgment of Stamp J.

1. *Inducing breach of contract*

The Imperial Hotel had an existing contract with Esso Petroleum Co. Ltd. for the supply of oil. Esso was informed of the dispute and their Mr. Bevan pointed out to Mr. Chapman that there was no point in the Imperial Hotel ordering a fuel delivery under the contract which would be prevented from being delivered.[8] Stamp J. was satisfied that the Imperial Hotel was forced to obtain its oil supplies from a more expensive source, Alternative Fuels Ltd.[9]

The contract [10] between Esso and the Imperial Hotel contained a *force majeure* clause.[11] The defendants pleaded, and Stamp J. accepted, that the circumstances of the *force majeure* clause had existed and that the effect of the clause prevented there being any breach of contract between Esso and the plaintiff company. The learned judge then said:

> " How then, so the defendants' argument runs, can the defendants have induced a breach of it? To induce a man to do an act which under a contract he is entitled to do does not

[7] Stamp J. was not satisfied that the union officials had properly understood Mr. Chapman's remarks: [1968] 3 All E.R. 53.

[8] " Nearly all oil tanker drivers are members of the defendant union and . . . [they] are not prepared to pass a picket or to make deliveries to premises the management of which is engaged in an official dispute with the defendant union ": [1968] 3 All E.R. at 51.

[9] " Whose drivers, I gather, are not members of the defendant union ": [1968] 3 All E.R. 54.

[10] For details of which see [1968] 3 All E.R. at 57.

[11] Cl. 10, which provided that " Neither party shall be liable for any failure to fulfil any term of this agreement if fulfilment is delayed, hindered or prevented by any circumstance whatever which is not within their immediate control, including . . . strikes, lockouts, labour disputes of any kind . . . (or the threat of apprehension of any of the foregoing events) . . . In the event of any of the foregoing circumstances arising, Esso shall be at liberty to withhold, reduce or suspend deliveries . . . to such extent as Esso in their absolute discretion may think fit and shall in no case be bound to purchase or arrange for deliveries from any other suppliers ": [1968] 3 All E.R. at pp. 57–58.

induce a breach and no tort is thereby committed. As a logical proposition there can, in my view, be no answer to it." [13]

For Stamp J. this was, however, an oversimplification of the problem and he proceeded to extend tortious liability to interference with contract under the guise of considering " the precise nature of the tort described as inducing or procuring a breach of contract." [13]

Stamp J. saw the essence of the tort as involving a " procurement of the violation of a right." [14] With respect one would not dissent from this analysis but only inquire what is meant by " a right " in this context:

" . . . prior to February 8, 1968, the plaintiff had the right, until the happening of one of the events specified in the *force majeure* clause, to delivery of oil by Esso within a reasonable time after a request for delivery seems clear. On February 8 that right ceased to be exercisable or was destroyed or was suspended; the plaintiff company no longer had the right to delivery within a reasonable time after an order for delivery. If the question then be asked: How did it come about that the plaintiff's right to delivery conferred upon them by the contract ceased to be a right to immediate delivery, the answer must, in my judgment, be by the effect of the action of the union officials on that day; and that action having continued after notice of the terms of the contract had been given there was, in my judgment, a tortious interference with the plaintiff's right under the contract." [15]

It is respectfully submitted that the legal rights of the plaintiff company can only be discovered by reference to the contract in question. The *force majeure* clause, previously agreed between the parties, operated to deprive the plaintiff company of a right to performance by Esso. The only remaining explanation is that of a right in the plaintiff to be protected against mere interference in business relations. But the learned judge purported to base his judgment on the tort of inducing breach of contract. Two authorities are cited for the proposition that although as between the parties to the contract there could be no action, there was nothing to prevent an action between one of the parties and an outsider in tort, *i.e.*, situations in which the rights of the plaintiff are to be discovered *beyond* the relationship between the contracting parties.[15a]

[13] [1968] 3 All E.R. at 58.

[13] *Ibid.*

[14] [1968] 3 All E.R. at 59; citing *Quinn* v. *Leathem* [1901] A.C. 495 at p. 510, and *Jasperson* v. *Dominion Tobacco Co.* [1923] A.C. 709 at p. 712 (P.C.)

[15] [1968] 3 All E.R. 59.

[15a] It is perhaps worth applying the analysis of the learned judge to the following fact situation: Suppose X is employed by Y under a contract of service which provides for termination of the agreement by an agreed period of notice on either side. If Z induced X, by an offer of higher wages, to terminate his contract lawfully by giving the requisite notice could it possibly be said that Z had tortiously interfered with Y's " right " to employ X? In a free economy labour-market that would be a very curious result.

In *Winsmore* v. *Greenbank* [16] a wife left her husband and lived apart from him, during which time a large fortune was left for her personal use. The defendant, in order to prevent the husband from benefiting from either the fortune or from a reconciliation, enticed the wife away. It was held that the action on the case for enticement succeeded. Stamp J. concluded that although the wife was not liable to be sued the husband could still sue the enticer in tort, likewise the Imperial Hotel could sue the defendants even though it could not sue Esso. It is respectfully submitted that the reasoning of the learned judge is open to criticism. The husband could not, of course, sue the wife but that was because of the special nature of the marriage relationship. In both procedural and substantive terms such an action was inconceivable.[16a] One has only to examine *Lumley* v. *Gye* [17] to discern the true nature of *Winsmore* v. *Greenbank* [16]: " . . . it was *prima facie* an unlawful act of the wife to live away from the husband; and it was unlawful, and therefore tortious, in the defendant to procure and persuade her to do an unlawful act; and, as the damage to the plaintiff was occasioned thereby, an action on the case was maintainable." [18] Thus the analogy fails once it is appreciated that as between Esso and the Imperial Hotel there was no breach, or, to use more colourful language, no unlawfulness.[19]

The other case referred to was *National Phonograph Co. Ltd.* v. *Edison-Bell Consolidated Phonograph Co. Ltd.*[20] In that case the defendants were on the plaintiff manufacturer's stop-list and by a *fraudulent misrepresentation* induced a wholesaler to sell them some of the plaintiff's products. It may be that as between the manufacturers and the wholesalers there was no breach of contract,[21] yet the plaintiff succeeded. That was clearly a case of an intentional unlawful act aimed at and causing damage to the plaintiff. That

[16] (1745) Willes 577; 125 E.R. 1330.

[16a] See, *e.g.*, Blackstone's *Commentaries*, i, 442, demonstrating the legal unity of the husband and wife.

[17] (1853) 2 E. & B. 216; 118 E.R. 749. Part of the *ratio decidendi* of *Lumley* v. *Gye* itself was the fact that Miss Wagner broke her contract with Lumley.

[18] *Ibid.* at p. 288; p. 757 (*per* Wightman J.); see also at pp. 282–288; p. 755 (Erle J.); at pp. 249–250; p. 761 (Coleridge J.). Presumably the learned judges had in mind the then prevalent philosophy of *Re Cochrane* (1840) 8 Dowl. 630 demonstrating the wife's legal duties towards the husband and his dominating influence over her. The decision has since been overruled: *R.* v. *Jackson* [1891] 1 Q.B. 671 (C.A.). Today the remedy of the husband against the wife would be a petition for restitution of conjugal rights. Alternatively, until 1857, the husband could obtain matrimonial relief against a deserting wife in the ecclesiastical court. The punishment for failure to return to the deserted spouse in 1745 could have been excommunication; in 1813 it became contempt and since 1884 there have been no direct sanctions. See Bromley's *Family Law* (2nd ed.), pp. 150–152, 156–157. I am indebted to Mr. Craig Murdoch for discussion of this problem.

[19] *Rookes* v. *Barnard* [1964] A.C. 1129. But see now *Morgan* v. *Fry*, *The Times*, June 28, 1968.

[20] [1908] 1 Ch. 335 at pp. 368–369 (*per* Kennedy L.J.).

[21] See Kennedy L.J., *ibid.* at p. 368, suggesting, rather strangely, that the innocence of the wholesalers prevented them from being in breach.

there are authorities to support such a finding is not disputed, indeed recent developments and commentaries point in that direction.[22] There is, however, a very definite line to be drawn between lawful and unlawful interference; whilst the latter may be actionable the former, on the highest authority, is not.[23]

At a later stage [24] the learned judge concludes that there is "another ground" which entitles the plaintiff company to an injunction. He says that "informing" the tanker drivers of a dispute at the Imperial Hotel amounted in effect to an "inducement" to the drivers to break their employment contracts.[25] "Here the breach, though the indirect result of influence, was its almost inevitable result, the pressing of the button was as a practical matter bound to cause the explosion." It is clear that Stamp J. is still referring to the tort of inducing breach of contract, for he uses the language of *Thomson* v. *Deakin*,[26] albeit in a confusing fashion, and cites *Daily Mirror Newspapers Ltd.* v. *Gardner* [27] and the *Square Grip* case.[28] If this was meant as a reference to the tort of inducing breach of contract by indirect, unlawful means it may be relevant to decide whether or not a trade dispute existed.[29]

[22] *Street on Torts* (4th ed.), Chap. 19, pp. 355–359; Dworkin and Harari, "The Beaudesert Decision—Raising the Ghost of the Action upon the Case" (1967) 40 A.L.J. 296, esp. at pp. 302–306 and pp. 347–351.

[23] *Allen* v. *Flood* [1898] A.C. 1, especially the judgments of Lords Watson, Herschell and Davey finally exploding notions of a "tort of malice." See *Bowen* v. *Hall* (1881) 6 Q.B.D. 333 (C.A.) and *Temperton* v. *Russell* [1893] 1 Q.B. 715. It is submitted that *Allen* v. *Flood* (*supra*) is still good law despite the remarks of Lord Devlin in *Rookes* v. *Barnard* [1964] A.C. 1129 at pp. 1215–1216. *Cf. Royal Commission on Trade Unions and Employers' Associations 1965–1968* (Cmnd. 3623) at paras. 895–900. *Quaere* whether s. 3, limb two, of the 1906 Act now has any meaning after *Rookes* v. *Barnard* (*Supra*).

[24] [1968] 3 All E.R. at 60.

[25] If that is a correct finding, and certainly the evidence on this point is very meagre, there would doubtless be a sufficient element of unlawfulness for the tort of interference discussed above. But see now *Morgan* v. *Fry*, the Times, June 28, 1968 (C.A.)

[26] [1952] Ch. 646 (C.A.). It is curious that although this binding Court of Appeal authority was fully argued before him Stamp J. at no time refers to it in the course of his judgment. The rules of precedent are clearly figments of academic imagination.

[27] [1968] 2 W.L.R. 1289 (C.A.); Wedderburn (1968) 31 M.L.R. 440.

[28] *Square Grip Reinforcement Ltd.* v. *Macdonald*, 1968 S.L.T. 65 (Outer House); Wedderburn (1968) 31 M.L.R. 550.

[29] As between Esso and the defendants, s. 3, limb one, of the 1906 Trade Disputes Act would then protect the defendants. It is suggested that in the climate of current judicial opinion the wording of the section would not protect the defendants in a Torquay Hotel situation, *i.e.*, where the plaintiff was a person other than the employer (see, *e.g.*, *J. T. Stratford & Son Ltd.* v. *Lindley* [1965] A.C. 269 at p. 338, *per* Lord Pearce, and *cf. Thomson* v. *Deakin* [1952] Ch. 646 at p. 687, *per* Lord Evershed M.R.). The element of unlawfulness required for the tort would not have been extracted from the indirect means. In policy terms this is a most unrealistic and absurd conclusion. What is, in effect, lawful for some purposes is, at the same time, unlawful for others. See now the remarks of Lord Denning M.R. in *Morgan* v. *Fry* in C.A. (as yet unreported) rejecting the view of Lord Pearce in *J. T. Stratford & Son Ltd.* v. *Lindley* (*supra*).

The terms of the injunction granted included a reference to contracts to be made in the future by the plaintiff company with oil suppliers.[30]

2. *Trade dispute* [31]

Stamp J. was not satisfied that on the evidence before the court there was a trade dispute either at the Torbay or Imperial Hotel. Despite the width of language in the 1906 definition the matter appeared to the judge to resolve itself as a question of fact in each case; not so much as to the construction of the section but as to the motives of the defendants.[32] There was only scanty evidence that employees at the Torbay were dissatisfied with their union representation [33] but there was evidence of inter-union rivalry.[34] The "primary and overriding purpose of the defendants was the advancement of the union's power and prestige in rivalry with another union." But if at the same time the union could have shown that it "was making a genuine claim for bargaining status" that might have produced a different result.[35] Stamp J. was even less impressed that there was a dispute at the Imperial Hotel.[36]

3. *Other matters*

Stamp J. accepted the submissions of counsel for the defendant that picketing did not always constitute a nuisance.[37] There must be a "substantial interference" with the use and enjoyment of property before nuisance is committed.[38] The plaintiffs failed to

[30] [1968] 3 All E.R. at 60. In issuing this part of the injunction Stamp J. considered a published statement by the defendant Pedley to be important: "the hotels won't know what hit them. The town is going to blow up, we shall get oil supplies cut off at every hotel in the area . . . we are quite prepared to put an embargo on any hotelier who intervenes." It is interesting to contrast the discussion of Jenkins L.J. in *Thomson* v. *Deakin* [1952] Ch. 646 at pp. 697–698. The "general exhortation" may be achieved by perfectly lawful means despite the language employed.

[31] Defined in the Trade Disputes Act 1906, s. 5 (3), as "any dispute between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment, or the terms of the employment, or with the conditions of labour, of any person. . . ."

[32] [1968] 3 All E.R. at 50.

[33] [1968] 3 All E.R. at 56.

[34] *Ibid.*

[35] *Ibid.* Thus the presence of an element of inter-union rivalry will not *per se* prevent the finding of the existence of a trade dispute within the section; *cf.* *White* v. *Riley* [1921] 1 Ch. 1. It has been suggested that inter-union rivalry could not be a trade dispute after *J. T. Stratford & Son Ltd.* v. *Lindley* [1965] A.C. 269: *Street on Torts* (4th ed.) at p. 348. *Cf.* the rather limited discussion of this important question in *Royal Commission on Trade Unions and Employers' Associations* (Cmnd. 3623), paras. 816–819.

[36] The judge may have been influenced by the fact that at no time did the defendant trade union have any members in the employment of the plaintiff company: [1968] 3 All E.R. at 48.

[37] There being a finding of no trade dispute, s. 2 of the 1906 Act had no application.

[38] *J. Lyons & Sons* v. *Wilkins* [1899] 1 Ch. 255; *Ward Lock & Co. Ltd.* v. *Operative Printers, etc.* (1906) 22 T.L.R. 327.

make out a prima facie case of such a degree of interference but the judge had no hesitation in issuing an injunction *quia timet*.

Although section 4 of the 1906 Act was argued at length before the court on the question of whether an injunction could issue to restrain a threatened tort by a trade union [39] the judge followed *Bowles & Sons* v. *Lindley* [40] almost without comment,[41] thus allowing the injunction. It may be that yet another trade union epic will reach the House of Lords and perhaps there will be some more legislation; whatever else, the potential litigants surely have the right to clarification of the law both in legal and policy terms.[42]

A. S. GRABINER.

MORE CONVULSIONS IN FAMILY PROPERTY LAW

IN *Appleton* v. *Appleton* [1] Lord Denning M.R., with the concurrence of Pearson and Davies L.JJ., introduced into English law a principle under which in given circumstances one spouse might gain a proprietary interest in a house belonging to the other, even in the absence of an express agreement, simply by working or spending money upon it. This idea was vigorously condemned by Lord Upjohn in *National Provincial Bank* v. *Ainsworth*,[2] although other members of the court did not comment directly upon it. Later in another case before the Court of Appeal, *Jansen* v. *Jansen*,[3] Lord Denning held his ground but did not succeed in carrying the rest of the court with him. Now separate Divisions of the Court of Appeal have returned to this problem in the cases of *Pettitt* v. *Pettitt* [4] and *Button* v. *Button* [5] and, delivering judgment on consecutive days, have reached curiously dissimilar conclusions. Comparison of the two cases provides a fascinating study, but most important is the fact that, while reluctantly following *Appleton*, the court in *Pettitt* granted leave to appeal and thus passed the whole matter up to the House of Lords.

The relevant facts of both cases were straightforward. In *Pettitt*, the matrimonial home was in the wife's name and had been bought

[39] See Citrine's *Trade Union Law* (3rd ed.), M. A. Hickling at pp. 593–595.

[40] [1965] 1 Lloyd's Rep. 207.

[41] He is surprisingly rather timorous at this point: "It would, I think, be undesirable, in view particularly of the conflicting dicta of higher authority, for a judge of first instance on an interlocutory application to do otherwise than follow the decision of Mr. Justice Atkinson. This I do": [1966] 3 All E.R. at 68.

[42] *Cf.* the discussion of Lord Reid though in a different context: *Suisse Atlantique Société d'Armement Maritime S.A.* v. *N.V. Rotterdamsche Kolen Centrale* [1966] 2 All E.R. 61 at p. 76. And see Eric Wigham, "But would the judges turn it upside down?" *The Times*, June 18, 1968, p. 25.

[1] [1965] 1 All E.R. 44.

[2] [1965] 2 All E.R. 472 at p. 487D.

[3] [1965] 3 All E.R. 368.

[4] [1968] 1 All E.R. 1068.

[5] [1968] 1 All E.R. 1064.

by her with the proceeds of sale of a house left to her by her grandmother.[6] The husband applied by summons under section 17 of the Married Women's Property Act 1882 for a declaration that, as a result of the work which he had done on the house, including making cupboards, putting up shelves, redecoration and laying out the garden, the value of the house had increased and that he had thereby acquired a proprietary interest in the house or the proceeds of sale. He claimed an interest of £1,000 as the amount by which the value of the house had been enhanced by his work. At first instance the Registrar held that he had a proprietary interest of £800 in the house or its proceeds, and this decision was upheld by the Court of Appeal (Willmer, Russell and Danckwerts L.JJ.). In *Button*, the home was in the husband's name and he had provided the deposit and mortgage repayments: in a similar summons under section 17, the wife sought a declaration that she was beneficially interested in one-half of the proceeds of sale as a result of the work which she had done in redecorating the house and in the garden. Reversing the decision of the Registrar, the Court of Appeal (Lord Denning M.R., Danckwerts and Widgery L.JJ.) held that the wife had acquired no proprietary interest.

The court in *Pettitt* unanimously, but reluctantly, held that it was bound by *Appleton*[7] (which it considered indistinguishable on the facts), all three members of the court regarding that decision as an error corrigible only by the House of Lords. Discussing the case on principle, Willmer L.J. gave three reasons why he would not have upheld the husband's claim had the matter been free of authority. First, the value of the rent-free accommodation that he had enjoyed outweighed the value of any work done on the house by the husband; secondly, the work done was the sort of work which any reasonable husband in the circumstances would either have done himself or paid for; and, thirdly, because the logical consequence of the husband's contention was that "the moment he puts up a shelf or touches up a window-sill it would follow that he had started to acquire a beneficial interest in the property."[8] However when Lord Denning delivered judgment in *Button* on the following day he explained that, "in the light [of the Court of Appeal's] observations [in *Pettitt*]," the position seemed to be that a spouse only acquired a proprietary interest in the matrimonial home by virtue of work "of a kind which normally a contractor is employed to do."[9] On this basis he was able to distinguish the case from *Appleton*, *Jansen* and *Pettitt* and reject the wife's claim

[6] It appears from the judgment of Russell L.J. that the matrimonial home was in fact paid for out of a joint account, then already overdrawn, and into which the money received as a result of the sale of the house left by the grandmother was later paid; see [1968] 1 All E.R. 1058 at p. 1061. However, no member of the court appears to have considered that this transaction was relevant in determining the title to the home.

[7] [1965] 1 All E.R. 44.

[8] [1968] 1 All E.R. 1058 at p. 1067E–I.

[9] [1968] 1 All E.R. 1064 at pp. 1066E–1067A.

since the work was the " ordinary kind of work which a husband or wife may do in the matrimonial home without giving the other a share or interest in it." [10]

Several points need to be made about Lord Denning's judgment. First, the part just quoted seems to make no sense at all, for the issue is whether the spouse who does the work acquires a share or interest, whereas the passage suggests that the point is whether " the other " spouse acquires the interest in the matrimonial home. This is surely a *lapsus styli*. Secondly, there is no mention in *Pettitt* of the " contractor's work " test which the Master of the Rolls purports to derive from that case, nor do any of the other authorities which he cites support such a distinction.[11] It is also noteworthy that Lord Denning was able to approve the decisions in *Appleton* and *Pettitt because* the work done by the husbands in those cases was work for which a skilled contractor would normally be employed, whereas in *Pettitt* Willmer L.J. felt bound by *Appleton* to allow the husband's claim *despite* the fact that it was the sort that a reasonable husband would either do himself or would pay a contractor to do. The novel test which Lord Denning has espoused may be seen as an attempt to salvage something from the probable wreck of his decision in *Appleton* in the light of the views expressed in *Ainsworth* and *Pettitt*. Whatever the origins of the test, it is submitted that it would be extremely difficult to apply in practice and of little relevance to a solution of the problem based on any concepts known to this branch of the law.[12]

It now remains to be seen how the House of Lords will resolve these issues in the *Pettitt* appeal. There is no doubt that the original theoretical basis for the decision in *Appleton* has been eaten away by the interpretation placed on section 17 by a majority of the

[10] *Ibid.* at p. 1067E.

[11] Lord Denning may possibly have derived the new test from the statement by Willmer L.J. in *Pettitt* to the effect that work done by the husband in that case was the sort of work which a reasonable spouse, in those circumstances, might have been expected to do for himself and to pay for. Clearly, these tests are by no means identical, for on Lord Denning's test a husband who made kitchen cupboards and a fitted wardrobe would acquire a proprietary interest because the work was skilled contractor's work, but this might well be classified as work that a reasonable husband, living rent-free in his wife's house, might do and pay for.

[12] Another perplexing aspect is that Danckwerts L.J., who gave judgments in both cases, was able to approve the reasoning of both Willmer L.J. and Lord Denning. For it is difficult to see how Willmer L.J. could have reached the same result as the Court of Appeal in *Button*, having held in *Pettitt* that the court was bound by *Appleton* to give the spouse an interest despite the fact that the work was the sort which a reasonable spouse in the circumstances would do or pay for. Furthermore, in his judgment in *Pettitt* Danckwerts L.J. states that the law more readily uses the presumption of advancement when a husband prima facie confers a benefit on his wife than *vice versa*; in *Button*, however, Lord Denning states that exactly the same principles apply, whether the matrimonial home is owned by the husband or the wife, and in his concurring judgment Danckwerts L.J. gives no indication of dissent from this proposition.

House of Lords in *Ainsworth*.[13] The view was there expressed that the section is merely procedural and does not allow the court to vary existing rights [14]; and Lord Denning himself has subsequently submitted to this interpretation.[15] Bearing this in mind, the conceptual foundation of the spouse's property right reasserted in *Pettitt* and *Button* is far from clear. Perhaps the most satisfactory answer is the resulting trust—a solution suggested by the judgment of Willmer L.J. in *Pettitt*. Noting that the mere assertion of work done was inadequate to establish a claim, he added: [16]

> "In the absence of any agreement this assertion could be justified only on the basis that the court ought to impute to the parties some common intention that the husband was to acquire an interest in the property commensurate with the value of the work which he did."

Russell L.J. was also disposed to disallow the husband's claim on account of the presumption of advancement, which is of course often used to exclude the operation of a resulting trust.[17]

The unreality of attempting to impute an intention that the parties never had can be avoided by employing the reasonable man. Thus one of the objections raised by Willmer L.J. to the respondent's claim was that the work done by the husband was no more than a reasonable husband would have done, whilst living rent-free in the matrimonial home owned by the wife. On this ground, it should be more difficult for a husband to acquire a proprietary interest in his wife's house than vice versa, thus allowing for the different view taken by the law of gifts between spouses reflected by the application of the presumption of advancement to gifts by husband to wife but not by wife to husband.[18] It is submitted that the resulting trust provides a solution consistent with familiar principles and explains the emphasis placed in the *Pettitt* judgments on the parties' imputed intentions. It is suggested

[13] [1965] 2 All E.R. 472 at p. 477 (Lord Hodson), at pp. 486–487 (Lord Upjohn) and at pp. 493–494 (Lord Wilberforce). Of course the general problem in *Appleton* and *Pettitt* is not confined to cases where only one party has a property interest. It can equally well arise where one spouse does work on property to which they are jointly entitled; see an unreported case, *Short* v. *Short* May 11, 1967, in which the Court of Appeal allowed a sum to the husband for work he had done on property to which they were jointly entitled. But where this is the case, the court will usually be able to adjust the existing rights by using its powers under s. 17 of the Matrimonial Causes Act 1965, which expressly permits this.

[14] Contrary to the interpretation placed on the section by Lord Denning in the past; *e.g.*, in *Hine* v. *Hine* [1962] 3 All E.R. 845.

[15] In *Bedson* v. *Bedson* [1965] 3 All E.R. 307 at p. 311. See also statement of Diplock L.J. in *Ulrich* v. *Ulrich* [1968] 1 All E.R. 67 at pp. 71–73.

[16] [1968] 1 All E.R. 1053 at p. 1057H.

[17] *Ibid.* at p. 1062C.

[18] Although the courts have recently come to the view that the presumption of advancement may be very easily rebutted where the asset concerned is for the joint use of the parties. See the remarks of Parker L.J. in *Silver* v. *Silver* [1958] 1 W.L.R. 259 at pp. 264–265; also *Fish* v. *Fish The Times*, November 16, 1965; *Fennell* v. *Fennell* (1966) 110 S.J. 707; and the remarks of Diplock L.J. in *Ulrich* v. *Ulrich* [1968] 1 All E.R. 67.

that two relevant factors to be considered in determining what work is reasonable are the value of the work and the extent to which the work could be described as maintenance rather than improvements of the home. Although these criteria may be no more precise than the "contractor's work" test, they are relevant to the establishment of a right based on a familiar concept.

The imputed intention of the parties would also be relevant if the proprietary right were based in contract. This was the ground upon which Davies L.J. decided *Jansen* v. *Jansen* [19]; the analysis presumably is that in return for the work done or paid for by the spouse, the spouse who owns the house agrees to hold a proportion of the proceeds of sale upon trust for the other. But there are two limitations to this solution. First, the court is likely to require exceptional circumstances from which to infer the existence of such a contract. Secondly, in the absence of a quite unambiguous commercial arrangement it seems inelegant to import the concept of contract into domestic relationships as a means of reaching a sensible result.

Once a proprietary right has been established, either on the basis of a resulting trust or a contract, the court will usually enjoy considerable freedom to mould the proprietary rights to do justice to the parties on account of the very wide interpretation of the word "settlement" contained in section 17 of the Matrimonial Causes Act 1965.[20] Once a settlement for these purposes exists, the court may adjust the respective rights as it considers fair in the circumstances.

In addition to an interest in the proceeds of sale, a spouse who does or pays for work on the matrimonial home owned by the other may also acquire a right to remain in possession against that spouse and those deriving title therefrom. This would be a right less than the one established in *Dillwyn* v. *Llewellyn* [21] which the courts are unlikely to generalise,[22] but would be more analogous to the one recognised in *Inwards* v. *Baker*.[23] However, the circumstances in which the court would find the necessary element of reliance without also having found the requirements of a resulting trust would be very rare. The fact of work or financial outlay by one spouse on the house of the other may also be relevant when the court is considering applications under section 1 of the Matrimonial Homes Act 1967. Hearing such applications, the court is required to have regard "to the conduct of the spouses in relation to each other *and otherwise*." [24] Work done by the spouse with no pro-

[19] [1965] 3 All E.R. 868 at p. 867.
[20] In cases such as *Cook* v. *Cook* [1962] 2 All E.R. 811.
[21] (1862) 4 De G.F. & J. 517.
[22] See the remarks of Lord Hodson in *Ainsworth* [1965] 2 All E.R. 472 at p. 479.
[23] [1965] 1 All E.R. 446.
[24] s. 1 (3).

prietary interest would surely be relevant in determining the nature of the order made.[25]

On the whole the courts have recently been reluctant to take the initiative in adapting the general law of property to the peculiar and changing needs of the ordinary family. The lead taken by Lord Denning in cases like *Hoddinott* v. *Hoddinott*,[26] and in the whole range of cases in which he sought to develop the deserted wife's equity, was not followed by other members of the judiciary; instead such statutes as the Married Women's Property Act 1964 and the Matrimonial Homes Act 1967 had to be passed to give legislative recognition to the very necessary changes which he was urging the judiciary to adopt. The confrontation over *Appleton* is simply another stage in this struggle. Whatever view the House of Lords chooses to adopt in the *Pettitt* appeal, it must be urged that the time for piecemeal reform of the law of family property has passed. The problem which has arisen again in these two cases can only ultimately be resolved within a new general framework of family property law which we must hope that the Law Commission will shortly provide.

J. M. EVANS.
SIMON ROBERTS.

GYPSIES AND THE LAW

THE decision of the Race Relations Board [1] that gypsies are protected by the Race Relations Act 1965 has been criticised by Dr. Glyn Daniel, who writes:

> "There is no such thing as 'the Romany race' . . . the gypsies are an ethnic group, not a race: they were the Rom of India who travelled to the western world in the Middle Ages preserving their nomadic habits, their ancient crafts as tinkers, and, naturally, as they did not outbreed, their racial characteristics . . . and their language." [2]

However, the Board's decision that publicans in Kent and Surrey who refused to serve gypsies were committing an offence under the Act, far from being proved "nonsense" (as Dr. Daniel contends in another part of his Editorial), is reinforced by his own

[25] Paradoxically, where *both* spouses have a proprietary interest in the home, and the marriage breaks down, it may be much more difficult for one to delay a sale against the wishes of the other. In hearing applications under s. 30 of the Law of Property Act 1925, the judges in the Chancery Division seem to take the view that once the marriage has broken down the purpose for which the home was purchased has come to an end, and a sale must be ordered accordingly, irrespective of the conduct of the parties; see *Jones* v. *Challenger* [1960] 1 All E.R. 785, *Rawlings* v. *Rawlings* [1964] 2 All E.R. 804 and *Re a Debtor, ex p. The Trustee* v. *Solomon* [1966] 3 All E.R. 255; also (1967) 30 M.L.R. 219.

[26] [1949] 2 K.B. 406.

[1] *The Times*, September 1, 1967.

[2] Editorial, *Antiquity*, XLI, 1967.

definition quoted above. The publicans, incidentally, claimed that they discriminated on grounds of smell only; but although recognising such grounds as a valid defence, the Board rejected it in this particular claim.

The relevant words of the Race Relations Act 1965 are:

> Section 1 (1): " It shall be unlawful for any person, being the proprietor or manager of or employed for the purposes of any place of public resort to which this section applies, to practise discrimination on the ground of colour, race, or ethnic or national origins against persons seeking access to or facilities or services at that place."

The description of gypsies as " an ethnic group "—people of the same ethnic or national origins—brings them fairly and squarely within the words of this section; and so, the decision of the Board to this effect—whether or not it also used the dictionary definition of " a member of the Romany race "—is surely unimpeachable.

If the Board is correct, gypsies are thus protected from private acts of discrimination, within the scope of the Race Relations Act; but they are not yet protected from parliamentary discrimination under legislation regulating the use of public places not covered by that Act (such as the highway) and imposing liability upon others according to their activities, but upon gypsies only so long as they *are* " gypsies." The need for a legal definition of the word " gypsy " thus becomes pressing. Unfortunately the courts and the Race Relations Board do not agree in their definitions.

The Queen's Bench Divisional Court had cause to examine this word in the case of *Mills* v. *Cooper*.[3] In February 1966, a magistrates' court dismissed an information against Mr. Cooper charging that in December 1965 he, being a gypsy, did without lawful authority or excuse encamp on a highway, contrary to section 127 of the Highways Act 1959. The magistrates upheld the submission of no case to answer on the ground that they were not satisfied that Mr. Cooper was a gypsy. In May 1967 a second information was preferred alleging a similar offence in March 1966. It was submitted on Mr. Cooper's behalf that the question of whether or not he was a gypsy had been decided by the court on the earlier occasion as a separate issue, and that an issue estoppel arose which debarred the magistrates from reopening the question and hearing the second information. The magistrates, unsure that the doctrine of issue estoppel applied in criminal cases, rejected this contention, but dismissed the information on the ground that it was oppressive and an abuse of the process of the court. The prosecution appealed to the Queen's Bench Divisional Court.

Section 127 of the Highways Act 1959 says: " If, without lawful authority or excuse . . . (*c*) a hawker or other itinerant trader or a gipsy pitches a booth, stall or stand, or encamps, on a highway, he shall be guilty of an offence . . . "

[3] [1967] 2 All E.R. 100.

The Divisional Court found it " difficult to think that Parliament intended to subject a man to a penalty in the context of causing litter and obstruction on the highway merely by reason of his race " [4] and, therefore, decided that " in this context ' gypsy ' means no more than a person leading a nomadic life with no or no fixed employment and with no fixed abode." [5] From this was drawn the conclusion that a man may not be a gypsy today, but, by changing his way of life, may become one tomorrow. Therefore, the question of issue estoppel could not arise, as the question in the first information was: was Mr. Cooper a gypsy in December 1965?; while in the second it was: was he a gypsy in March 1966?

It seems that the Race Relations Board, in their decision referred to above, thought that the decision of the Queen's Bench Division could be restricted to the context of section 127 of the Highways Act 1959, and was not therefore relevant to their own decision as to whether the word " gypsy " had racial connotations or not. But even if it can be so restricted, can the court's definition be regarded as satisfactory? On what was it based? Let us take the last question first:

Lord Parker felt constrained to justify his rejection of the Oxford Dictionary's definition (" a member of the Romany Race ") with these words: " In saying that, I am hoping that those words will not be considered as the words of a statute, but merely as conveying the general colloquial idea of a ' gypsy.' " [6]

With respect, it is tempting to inquire whence the Lord Chief Justice derived this " general colloquial idea." It might be claimed as sweepingly—and as vaguely—that the " general idea " of a gypsy often involves notions of race and of " racial " characteristics, albeit that those characteristics may include an itinerant way of life. However, as both notions are equally unsupported by evidence at present (unless it be evidence of discrimination!)—let alone by proof—it would surely be better to choose an objective definition of our terms rather than to try to justify purely personal conceptions by attaching to them such labels as " general colloquial idea " or " popular meaning." As pointed out in *Antiquity* " a person leading a nomadic life is not necessarily a gypsy." [7]

The court's difficulty in accepting gypsies as an ethnic group arose, partly, because this aspect was discussed only in terms of the dictionary definition, " a member of the Romany race," which the court thought to be " something too vague of ascertainment " [8]; and, partly, because—according to Lord Diplock—" counsel for the respondent only faintly argued " the point.[9] But mostly, the reticence was caused, as we have seen, by a reluctance to recognise

[4] *Mills* v. *Cooper* [1967] 2 All E.R. 100 at p. 106.
[5] [1967] 2 All E.R. at p. 103.
[6] [1967] 2 All E.R. at p. 103.
[7] *Antiquity*, XLI, 1967 (Editorial).
[8] [1967] 2 All E.R., *per* Lord Parker at p. 103.
[9] [1967] 2 All E.R. at p. 104.

a blatant piece of discriminatory legislation for what it is. An understandable caution, but, I would submit, one which has not produced especially helpful results.

If the word "gypsy" were to carry racial connotations in section 127, "it would mean," said Lord Diplock, "that Parliament in 1959 had amended the corresponding section to the Highways Act 1835,[10] which referred to 'gypsy or other person' so as to discriminate against persons by reason of their racial origin alone." [11] As Mr. Michael Scott of the University of Tasmania has pointed out: "the plain unfortunate fact of the matter is that the section means exactly what it says, and is merely the latest in a series of statutes discriminating against the gypsy race." [12] Mr. Scott cites earlier Acts all of which clearly identified the gypsies as an ethnic group: in 1531, an Act of Henry VIII referred to "an outlandish people calling themselves Egyptians," and further enactments in the reigns of Mary and Elizabeth I similarly referred to "Egyptians." The wording of the 1835 Act, "a gypsy or other person," clearly preserved the distinction. The omission from the 1959 Act of "or other person" may be seen either as the omission of a redundant term, or as the limitation of the provisions of the section to those people clearly defined as types of wanderer—*i.e.*, hawkers, itinerant traders, or gypsies.

The court tried to read the word "gypsy," in *Mills* v. *Cooper*, "in context," and inferred that gypsies are a whole class of people—people of "no fixed employment or abode." But the Act may more easily and more logically be read to mean that gypsies are but a sub-type of a class—the class being wandering people—and that hawkers and itinerant traders are similarly members of that class.

If we take the anthropological viewpoint and (despite Dr. Daniel's protests) that of the Race Relations Board that gypsies are an ethnic group, we must conclude that the 1959 Act *does* "discriminate against persons by reason of their racial origin alone." And although clearly showing that the statute is, in this respect, somewhat harsh, this is surely the correct interpretation of section 127, nevertheless. Historical facts show that the belief of the court that Parliament could not possibly have meant "gypsy" to bear racial implications is self-delusory: it may have been an oversight by the legislature to continue the discrimination initiated by the earlier statutes, but the conviction that the distinction would not have been retained had Parliament thought about it cannot alter the fact that it *was* retained.

On the other hand, it may be argued that it does not matter, in the context of the Highways Act, if Parliament discriminated against gypsies. The provisions in section 127 are intended to keep public highways unobstructed by wanderers—whether the wandering arises from the nature of a person's trade or because of the

[10] s. 72.
[11] [1967] 2 All E.R. at p. 104.
[12] *Race*, July 1967.

nomadic habits of his ethnic group. However, as the section stands, it is enough in cases involving gypsies to show that the offender is a " gypsy "—and whatever definition one gives to that word it can hardly be considered satisfactory in the twentieth century that to fit a definition not usually carrying criminal implications is to become immediately eligible for certain criminal liabilities. It is anachronistic to cling to a rule that makes simply being a gypsy an offence—albeit only in certain circumstances. It is clear that amending legislation is required.

Meanwhile, it would surely be preferable—if only for the sake of uniformity—for the courts to accept the Race Relations Board's contention that " gypsy " means more than a person of " no fixed employment or abode " and apply the 1959 Act accordingly. At the same time, any act of discrimination against gypsies, so long as it is motivated by considerations of ethnic origins and not by considerations of hygiene or the infringements of statutory regulations, must clearly be seen as a breach of section 1 of the Race Relations Act 1965 (and any future Acts with the same fundamental requirements) and must be dealt with as such.

ROBINA EDMONDS.

76/105THS OF PARADISE LOST—TO ADVERSE POSSESSORS

A CASE of contemporary significance but with a good old-fashioned real property flavour is the recent decision of the Privy Council in *Paradise Beach and Transportation Co. Ltd. and Others* v. *Price-Robinson and Others*.[1] Paradise is a coral island in the Bahamas, where the law is still bereft of the benefit of legislation similar to our 1925 Property Acts and Limitation Act 1939, and is still in that " innocent state " that existed here before such legislation.

In 1918, the deceased owner of a strip of Paradise (then unpoetically called Hog Island) had devised it to a number of named children and grandchildren as tenants-in-common, but only two of them, Rozeliza and Victoria (since dead) had ever been in possession of the land, which exclusively they farmed. Their cousin John (another of the tenants-in-common) visited them occasionally and may have received gifts of vegetables from them but, not surprisingly, the Privy Council rejected the contention that this amounted to a taking of possession by Cousin John. Now, however, a claim was made against Rozeliza and Victoria's successors in possession of the land, the claim being by those who derived a paper title to 76/105th of the land from the original tenants-in-common. The defence was that Rozeliza and Victoria and their successors had extinguished the claimants' paper titles by long-continued possession under the provisions of the Real Property Limitation Acts 1833 and 1874. These Acts are the same for all

[1] [1968] 2 W.L.R. 873; [1968] 1 All E.R. 530.

relevant purposes as those identically named Acts which existed here until the Limitation Act 1939. The 1939 Act re-enacted the relevant provisions except section 12 of the 1833 Act, which provides in effect that a co-owner of land can extinguish the titles of his fellow co-owners by possessing for the appropriate limitation period more of the land or receiving more of its rents and profits than his share warrants. This was intended to abolish the pre-1833 technical doctrine of non-adverse possession by which the possession of one co-owner was deemed to be the possession of all, unless an actual ouster was proved.[2]

Prima facie the possessory title through Rozeliza and Victoria would seem to be established by this provision but it was argued for the claimants that, as Rozeliza and Victoria had done nothing wrongful in farming all of the land,[3] they had not possessed "for their own benefit," *i.e.*, adversely to the other co-owners. The Privy Council refused to accept this argument, partly treating the point as a question of fact but saying that "the law may sometimes imply that one co-tenant is in possession for another co-tenant, *e.g.*, a father for his infant but not adult son, see *Re Hobbs*[4]; otherwise it is a question of proving some agency or trusteeship or acknowledgment of title on the part of those in possession."[5] The claimants' appeal was therefore dismissed.

So much then for the case's old-fashioned flavour—what of its contemporary significance? Had these events occurred in this country, the decision would, if *Re Landi*[6] were followed, be exactly the opposite, on the legalistic ground adopted by the Court of Appeal in that case that, as since 1925 co-ownership must take effect behind a trust for sale, one co-owner, being also a trustee, cannot acquire title by adverse possession to what is in effect trust property.[7] The writer has already argued elsewhere[8] that *Re Landi* was wrongly decided and has suggested that the 1925 legislation did not alter the substantive law of limitation between co-owners.[9] If these arguments are accepted, then the Privy Council's decision in the *Paradise* case is an important guide to when our law should

[2] See, *e.g.*, *Corea* v. *Appuhamy* [1912] A.C. 230 (Ceylon, pre-1833 law in force).

[3] *Henderson* v. *Eason* (1851) 17 Q.B. 701 (one co-owner growing crops with his own capital—no duty to other, even to account). *Cf. Jacobs* v. *Seward* (1872) L.R. 5 H.L. 464 (one co-owner making hay and putting lock on gate—not ouster, but duty to account).

[4] (1887) 36 Ch.D. 553; it is arguable that this concept of bailiff for an infant, preventing possession being adverse even after the infant becomes 21, is inconsistent with the express provision of s. 22 of the Limitation Act 1939 as to the disability of infancy.

[5] [1968] 2 W.L.R. 878, 880; [1968] 1 All E.R. 530, 535.

[6] [1930] Ch. 328.

[7] See s. 19 of the Limitation Act 1939. Even if he were not a trustee, being a beneficiary his possession would presumably not be adverse, by virtue of s. 7 (5) of the 1939 Act.

[8] (1965) 29 Conv.(n.s.) 356 at 362–366.

[9] See s. 12 of the Law of Property Act 1925 (Part I of Act not to affect limitation) and next note.

permit a co-owner to extinguish his fellow co-owners' titles by adverse possession.

In using this guide, however, it must be borne in mind that the Limitation Act 1939 contains no provision similar to section 12 of the 1833 Act (*supra*) and one would simply have to interpret section 4 of the 1939 Act, which starts time running from the date on which a right of action to recover land [10] accrues to the plaintiff. In the *Paradise* case, the Privy Council construed section 12 of the 1833 Act as starting time running from the death of the father in 1913, since from that very moment Rozeliza and Victoria had possessed the land for their own benefit. Probably a similar result could be achieved in this country, without the aid of section 12 of the 1833 Act, by invoking the rule that the expression, an action for recovery of land, " does not mean regain something which the plaintiff previously had and lost, but means ' obtain any land by judgment of the court '; yet it is not limited to ' obtain *possession* of any land by judgment of the court.' " [11] Thus the possibility of an action by a co-owner for a declaration of his title should suffice to cause time to run *ab initio* without any ouster or trespass by the co-owner in possession.[12] Similarly, the possibility of an application by a co-owner to the court to exercise its discretion to order a partition or restrain a sale [13] should be enough to cause time to be running.[14] Let us hope to see here this form of Paradise regained.

MICHAEL GOODMAN

A WELSHMAN'S CASTLE

THE problem facing the Court of Appeal in *Chic Fashions (West Wales) Ltd.* v. *Jones* [1] was whether police officers, who had lawfully entered the plaintiffs' shop with a search warrant entitling them to search for and seize clothing made by a particular manufacturer, were entitled to seize other items of clothing not mentioned in the warrant, but which they had reasonable grounds for believing were stolen property. The seized garments appeared to have had the manufacturers' labels removed; they were of a type recently stolen; and were priced more cheaply than might normally be expected. The manager of the shop later gave a satisfactory explanation that the clothing was made from surplus cloth and that the manufacturers had insisted that their labels should not be used.

[10] " Land " being defined by s. 81 (1) of the Limitation Act 1939 as " including an interest in the proceeds of sale of land held upon trust for sale."
[11] *Williams* v. *Thomas* [1909] 1 Ch. 718 at 730.
[12] See *Vandelour* v. *Sloane* [1919] 1 I.R. 116. It is perhaps significant that in the *Paradise* case the action was for a declaration or certificate of title.
[13] Under the jurisdiction conferred by ss. 28 and 30 of the Law of Property Act 1925.
[14] *Cf.* Limitation Act 1939, s. 81 (1): " ' Action ' includes any proceeding in a court of law. . . ."
[1] [1968] 1 All E.R. 229; [1968] 2 W.L.R. 201.

It was necessary to balance the freedom of the individual and the security of his property against "the interest of society at large in finding out wrongdoers and repressing crime," [2] but there was no authority directly in point and section 42 of the Larceny Act 1916 appeared to give no help. The court emphasised that previous decisions could only give indications "where on this matter various judges would have thought the balance lay between the inviolability of private property and the *pursuit of public weal* in a society of the kind in which they lived." [3] "The society in which we live is not static, nor is the common law, since it comprises those rules which govern men's conduct in contemporary society on matters not expressly regulated by legislation. That is why in the question we have to answer I have stressed the word 'today'." [4]

All three judges stressed that they were deciding what the common law powers of the police should be in 1967, and that the balance should be drawn in a different place to that drawn by the judges in *Entick* v. *Carrington*,[5] which they took as their starting-point. Lord Denning M.R. traced the developments subsequent to *Entick* v. *Carrington*, showing how the courts had gradually allowed constables to seize goods not mentioned specifically in the warrant, but which were believed to be mentioned in the warrant, which proved the identity of stolen goods, or which proved the guilt of the thief or receiver.[6] Larceny and receiving—especially, one might add, of mass-produced articles—are today organised on a greater scale and with greater skill than in 1765 and even then there was an exception to the inviolability of the Englishman's home where stolen goods were concerned. In order to protect the Englishman's property, it was necessary not only to interfere with a suspected criminal's liberty but also to obtain evidence against him and to return stolen property to the victim.

> "If the preservation of law and order requires that a policeman shall have the power to arrest a man whom he believes on reasonable grounds to be a thief or receiver, it is difficult to understand why the policeman should not have the power to seize goods on that man's premises which the policeman believes on reasonable grounds that he has stolen or received." [7]

[2] *Per* Lord Denning M.R. [1968] 1 All E.R. 229 at p. 236; [1968] 2 W.L.R. 201 at p. 209.

[3] *Per* Diplock L.J. [1968] 1 All E.R. 229 at p. 237; [1968] 2 W.L.R. 201 at p. 211.

[4] [1968] 1 All E.R. at pp. 237–238; [1968] 2 W.L.R. at p. 211.

[5] (1765) 19 St.Tr. 1029.

[6] *Price* v. *Messenger* (1800) 2 Bos. & P. 158; *Crosier* v. *Cundey* (1827) 9 Dow. & By.K.B. 224; *Pringle* v. *Bremner and Stirling* (1867) 5 Macph. (H. of L.) 65; *Dillon* v. *O'Brien and Davis* (1887) 16 Cox. C.C. 245. Other cases relevant here are *Elsee* v. *Smith* (1822) 1 Dow. & By.K.B. 97 and *Jones* v. *German* [1896] 2 Q.B. 418 (affirmed [1897] 1 Q.B. 374 (C.A.)).

[7] *Per* Salmon L.J. [1968] 1 All E.R. at p. 240; [1968] 2 W.L.R. at p. 215.

It is important to note that the court confined its decision to powers of seizure of goods to be used as evidence against the possessor of the goods or his associates.

> " The case was argued before the county court judge on the broader submission by the defendant that it was sufficient justification for the seizure that the police officers had reasonable grounds for believing that the goods had been stolen and might be material evidence on the prosecution of a criminal charge against any person, whether that person was the plaintiffs themselves or some other third party." [8]

In paragraph 9 of the amended defence and in Lord Denning's summary of the agreed facts no mention was made as to the person against whom any prosecution was to have been brought. However, since it was obvious that the police officers had seized the garments suspecting that the plaintiffs had stolen or received them and the appeal was heard on the more limited ground, Salmon L.J. was prepared to " incline to the view that if a policeman finds property which he reasonably believes to be stolen in the possession of a person whom he has no reasonable grounds to believe is criminally implicated, the policeman has no common law right to seize the property." [9]

Having come to the conclusion that the police officers had a common law power to seize the clothing, the court emphasised that the legality of the exercise of such a power must be its legality at the time of commission. Casting doubts on the decision of Horridge J. in *Elias* v. *Pasmore*,[10] Lord Denning M.R. stated that seizure of property " must be justified at the time, irrespective of whether the case goes for trial or not. It cannot be made lawful or unlawful according to what happens afterwards." [11] The court cast even graver doubts on " the antiquarian doctrine of trespass *ab initio*." [12] What was necessary was to look at the individual acts: had they power to search and seize goods? If an act was lawful at the time of commission, then it could not be invalidated by any subsequent unlawful action on their part.

It may well be that the court has anticipated the legislature here. It held that section 42 of the Larceny Act 1916 was silent as to power to seize goods not mentioned in the warrant. The Theft Act 1968, s. 25 (3) states: " Where under this section a person is authorised to search premises for stolen goods, he may enter and search the premises accordingly, and may seize any goods he believes to be stolen goods." It should be noted, however, that this section is not confined to seizure of goods in the possession of a potential accused.

D. W. POLLARD.

[8] *Per* Diplock L.J. [1968] 1 All E.R. at p. 237; [1968] 2 W.L.R. at pp. 210–211.
[9] [1968] 1 All E.R. at p. 240; [1968] 2 W.L.R. at p. 216.
[10] [1934] 2 K.B. 164 at p. 178.
[11] [1968] 1 All E.R. at p. 236; [1968] 2 W.L.R. at p. 209.
[12] *Per* Diplock L.J. [1968] 1 All E.R. at p. 239; [1968] 2 W.L.R. at p. 213.

R. v. WHEAT AND STOCKS—R.I.P.

THE unhappy ghost of *R.* v. *Wheat and Stocks* [1] has finally been laid to rest by the Court of Appeal, Criminal Division, in the recent case of *R.* v. *Gould*.[2] *Wheat* has haunted our law of bigamy for forty-seven years with a rule which could "lead to consequences which would not only be contrary to principle but which would be discreditable to our system of criminal law." [3] One cannot help but endorse these sentiments in relation to a case in which, as Professor Glanville Williams has observed, "the '*mens rea*' doctrine reached its nadir." [4] Yet in spite of the criticism and condemnation it has received the case has remained good law here, stating as it does that it is no defence to a charge of bigamy that the accused honestly but mistakenly believed on reasonable grounds that his first marriage had been terminated by divorce.

The facts of *Gould* were that the appellant was married in 1959 and there were three children of the marriage. Several years later a divorce suit was entered and the appellant's solicitors gave notice to defend. However, before the case was heard the appellant was sentenced to twelve months' imprisonment and was released in March 1966. He returned to his wife but on being told by her the following month that their marriage was finished he left her and, in the following November, he married again. When interviewed by the police the appellant stated that he had agreed to remarry because he thought that he was divorced. In fact at the date of his second marriage, his first marriage had not been dissolved. At quarter sessions the appellant originally pleaded guilty to a charge of bigamy, but defence counsel later sought to withdraw that plea since he wished to raise the defence that the accused honestly believed on reasonable grounds that at the time of his second marriage the previous marriage had been dissolved by a decree absolute of divorce. The deputy chairman then heard argument but in the event felt constrained to follow the decision of the Court of Criminal Appeal in *Wheat and Stocks* and would not allow the initial plea of guilty to be withdrawn.

On appeal Diplock L.J., reading the judgment of the Criminal Division, dealt first with the question of the binding authority of *Wheat and Stocks*, a decision of the Court of Criminal Appeal. The Criminal Appeal Act 1966 states that "the jurisdiction exercisable before the commencement of this Act by the Court of Criminal Appeal shall, subject to the provisions of this section, be exercisable by the Court of Appeal and the Court of Criminal Appeal shall cease to exist." [5] The Court of Criminal Appeal enjoyed more freedom in relation to *stare decisis* than did the Court of Appeal, whose

[1] [1921] 2 K.B. 119.
[2] [1968] 1 All E.R. 849.
[3] *Thomas* v. *R.* (1937) 59 C.L.R. at p. 311, *per* Dixon J.
[4] *Criminal Law: The General Part* (1961), p. 178
[5] s. 1 (1).

limitations were marked out in *Young* v. *Bristol Aeroplane Co.*[6] It would not feel bound by its own previous decisions where, on reconsideration, it was of the opinion that the law had been misapplied or misunderstood in the earlier decision.[7] Any doubt that may have existed as to whether the Court of Appeal, Criminal Division, would inherit its predecessor's more flexible approach is swept away in *Gould*. Diplock L.J. makes it quite clear that the Court of Appeal, in the exercise of its criminal jurisdiction, is still free within the bounds of *Taylor* [7] to ignore a previous decision of its own or of its predecessors of co-ordinate jurisdiction. *A fortiori* where, as in the present case, a previous decision " is one of which the *ratio decidendi* conflicts with that of other decisions of this court or its predecessors of co-ordinate jurisdiction." [8] In the event, the Criminal Division invoked *Taylor* although Lord Goddard C.J. had reserved such a power for a full court.[9] This indicates that the Criminal Division has fallen into line with the basic Court of Appeal idea that decisions of a full court carry no more weight as precedents than those of a normal court.

The statutory statement of the crime of bigamy is now contained in section 57 of the Offences against the Person Act 1861. Diplock L.J. conveniently analyses the section, splitting it up into its constituent elements in terms of the offence and the " exceptions " thereto. The elements of the offence are: (a) a married person; (b) going through the form or ceremony of marriage with another person; (c) during the life of his or her spouse. There are then four exceptions listed in the proviso, *viz.*:

(i) where the second marriage is contracted outside England or Ireland by someone who is not one of Her Majesty's subjects;

(ii) when the second marriage takes place after the first spouse has been continually absent for seven years and was not known to have been alive during that period;

(iii) where the accused, at the time of his second marriage, has been divorced from the bond of the first marriage;

(iv) where the court has declared the former marriage void.

As Diplock L.J. points out,[10] the only true exceptions are (i) and (ii). " Exceptions " (iii) and (iv) neither add to nor detract from the enacting words, and in particular from the phrase " being married." Their inclusion in section 57 seems to stem from their inclusion in the first Act which made bigamy a felony (1 Jac. c. 11), which is explicable on the ground that it was thought prudent to state precisely the consequences of a decree from the ecclesiastical courts in relation to a newly created felony, the jurisdiction of those courts being at that time the object of political controversy. In the superseding Acts, 9 Geo. 4, c. 81, and the 1861 Act, this surplusage

[6] [1944] K.B. 718.
[8] [1968] 1 All E.R. at p. 851.
[9] [1950] 2 K.B. at p. 371.
[7] *R.* v. *Taylor* [1950] 2 K.B. 368.
[10] [1968] 1 All E.R. at p. 852.

was retained although, by 1861, the new statutory Divorce Court could grant a decree of divorce " a vinculo matrimonii " which brought the marriage to an end. The legacy has proved to be an unfortunate one.

In *Tolson* [11] the Court for Crown Cases Reserved was faced with the argument that section 57 specifically offered a defence on the basis of seven years' absence and that therefore *five* years' absence should not lead to the conviction being quashed. But, as Cave J. pointed out,[12] " at common law an honest and reasonable belief in the existence of circumstances which, if true, would make the act for which the prisoner is indicted an innocent act has always been held to be a good defence." The mere fact that the legislature had included a specified exception did not prevent the common law exception arising if the latter was narrower in scope than the statutory exception. This was indeed the case because under the statutory exception, the accused's honesty and the reasonableness of his belief are not in issue. The effect of the majority decision in *Tolson* was that *although* Mrs. Tolson could not bring her case within the statutory exception, the enacting words were not absolute in form. She did not intend, being married, to marry any other person *during the life of her former husband—i.e.*, according to Diplock L.J. the mistaken belief was that element (c) was lacking. Here again section 57 shows itself to be unnecessarily verbose: element (c) seems to add nothing to element (a)—" being married." Mrs. Tolson simply did not intend, *being married*, to marry another person.

It is partly due to the unnecessary inclusion of (c) that the Court of Criminal Appeal in *Wheat and Stocks* [13] misinterpreted *Tolson* and thus succeeded in distinguishing it. In *Wheat and Stocks* the court observed that Mrs. Tolson " did not intend at the time of the second marriage to do the act forbidden by the statute—namely, to marry during [her husband's] life," [14] thus inferring that Wheat did intend to marry during his first wife's life. This indeed was his intention but the fallacy exists in stating that the forbidden act is *marrying during the first spouse's life*. This convenient slip enabled the court in *Wheat and Stocks* to distinguish *Tolson*. Having done so, the court subsequently—and tantalisingly—stated the act forbidden more accurately as " *being married*, to marry another person during the life of the former wife or husband." [15] If the Court of Criminal Appeal had paused at this point an unhappy decision might never have materialised. Subject to the requirement that Wheat's mistaken belief was honest and was based upon reasonable grounds he did not intend *being married* to marry another person, etc. The court further distinguished *Tolson* on the footing that the latter case turned on the presence of exception (ii) which involves a presumption of death. But, according to *Wheat and Stocks*, in the

[11] (1889) 23 Q.B.D. 168.
[12] *Ibid.* at p. 181.
[13] [1921] 2 K.B. 119.
[14] *Ibid.* at p. 125.
[15] *Ibid.* at p. 126.

case of exception (iii) " there is no indication in the statute that any presumption or belief is to afford any defence . . . the only defence under this head appears to be that the accused has in fact been divorced from the bond of the first marriage." Consequently the court felt that " in our opinion this decision is not in conflict with the decision of the majority of the judges in *R.* v. *Tolson*." [16] " This reasoning, however, with great respect, does not bear analysis " is the comment of Diplock L.J. The majority decision in *Tolson* was based squarely on the enacting words which were " construed as subject to the general rule applicable to statutes creating serious criminal offences that *mens rea* is a necessary ingredient in the offence." [17] The inevitable conclusion, reached in *Gould*, is that both *Tolson* and *Wheat and Stocks* were decided on the enacting words and therefore conflict.[18] Indeed one can go further, if it is accepted that element (c) is mere surplusage, and say that the two cases take opposite views with regard to the same element—*viz.*, " being married."

The Criminal Division in *Gould*, turning to the Australian law on the subject, discovered that their experience has been more satisfactory. This is witnessed in the case of *Thomas* v. *R.*[19] decided under the Crimes Act 1928 (Vict.), s. 61 (in almost identical terms to our section 57). In that case the accused mistakenly believed that his first wife's previous marriage had not been dissolved by a decree of the court and that therefore his marriage to her was void, and that he was free to remarry. On the basis of this mistake, the accused entered into a second marriage with one Miss Bessie Deed. By a majority of three to two [20] the High Court of Australia quashed the conviction, although all five judges regarded *Wheat and Stocks* as indistinguishable: *i.e.*, in both cases there was a mistake as to element(a). Consequently, *Wheat and Stocks* was inconsistent with *Tolson* and the view contained in the latter case should be adopted.[21]

The situation in *King* [22] was on all fours with *Thomas*, which decision was followed, though on the facts in *King* there was no evidence to support the defence. However, there was an element of " duplicity," if one may respectfully use the term, in *King*. While adopting the more liberal approach, the Court of Criminal Appeal considered that *Wheat and Stocks* was distinguishable, on

[16] *Ibid.* at p. 125.
[17] [1968] 1 All E.R. at p. 853.
[18] *Ibid.* at p. 853.
[19] (1937) 59 C.L.R. 279.
[20] Starke J. (p. 296) justified *Wheat and Stocks* on the basis propounded by Stallybrass (52 L.Q.R. 65), *viz.*, it involved a mistake of law. This view is rejected in *Gould* at p. 854.
[21] Dixon J. rejected what he called " the principles of the Mikado " contained in the observation " that's the pathetic part of it. Unfortunately the fool of an Act says 'compassing the death of the heir apparent.' There's not a word about mistake, or not knowing, or having no notion, or not being there. There should be, of course, but there isn't. That's the slovenly way in which these Acts are drawn " (1937) 59 C.L.R. at pp. 303–304.
[22] [1968] 3 All E.R. 561.

the basis that the latter was a proviso case. Lord Parker said: "The facts there were quite different from those in this case; it was not a question of an honest belief that the earlier marriage was not a valid marriage, but was said to be an honest belief that the first marriage, though valid originally, had been dissolved." [23] Should such a supposed distinction be allowed to draw the line between guilt and innocence? This distinction could only have any significance if "being married" was given the unusual meaning of "having been married," thus bringing the situation in *King* to be decided under the enacting words, and *Wheat and Stocks* under the proviso. Diplock L.J.[24] rejects the distinction and states that in both cases the mistake related to element (a). If, on the other hand, the distinction were upheld it becomes more morally blameworthy to hold a mistaken belief that a decree absolute *has* been granted (*Wheat and Stocks*) than to mistakenly believe that such a decree *has not* been granted (*King*).[25] Once it is recognised, as it was in *King*, that the offence is not an absolute one, an honest belief on reasonable grounds in facts which, if true, would make the second marriage innocent should be a defence, and the above purported distinction should be irrelevant.

And so, having stood as good law for forty-seven years, *Wheat and Stocks* has been stated by the English Court of Appeal to have been wrongly decided. But one cannot refrain from wondering if a considerable amount of difficulty and discredit could have been avoided if section 57 had been stripped of apparently unnecessary adornments. "Exceptions" (iii) and (iv) add nothing to the enacting words, and element (c) would seem to add nothing to "being married." A comparison with the New Zealand statutory provision is interesting. Contained in the Crimes Act 1961, s. 205 (formerly the Crimes Act 1908, s. 224), it stated: "Bigamy is the act of a person who, being married, goes through a form of marriage in New Zealand with a third person. . . ." The only statutory defence is almost identical to the "seven years" defence in our section 57. In *Carswell* [26] the New Zealand Court of Appeal stated quite clearly that an honest and reasonable belief in the existence of any facts which, if true, would make the act innocent will suffice to negative the *mens rea* required for bigamy. It has taken us forty-two years longer to reach the same stage. The reluctance to allow such a defence seems in the words of Dixon J. to be due to "a lack of confidence in the ability of a tribunal correctly to estimate evidence of states of mind and the like" but that "can never be sufficient ground for excluding from inquiry the most fundamental element in a rational and humane criminal code." [27]

J. B. S. DIEHL.

[23] *Ibid.* at p. 564.
[24] [1968] 1 All E.R. at p. 855.
[25] *Ibid.* at p. 856.
[26] [1926] N.Z.L.R. 821.
[27] (1937) 59 C.L.R. at p. 809.

REVIEWS

JUSTICE OF THE PEACE. By LEO PAGE. Third Edition by R. M. JACKSON and P. J. HALNAN. [London: Faber and Faber Ltd. 1967. 278 pp. (with index). 42s. net.]

THE late Sir Leo Page was Clerk of Commissions in the Lord Chancellor's Office for many years. He brought unrivalled experience, a clear style, and a sympathetic understanding of the work of a justice of the peace to the writing of this book, which in my view is much the best introduction to his work that a magistrate can study. It appeared in 1936 when its value was at once recognised, and even in that rather supine period in the history of the magistracy a new edition would have been quickly called for but for the outbreak of the war. Sir Leo did in fact produce a second edition in 1947 but during the next twenty years not only the law administered by justices of the peace, but the quality and training of those chosen for the work, and the organisation of their courts underwent changes which, in relation to certain of their aspects at any rate, could properly be called revolutionary. As a result, although much of what the author had said remained of great value, from the factual point of view the book had become completely out of date, and something in the nature of a new book rather than just a new edition was called for. This, Professor Jackson has produced in collaboration with the Justices' Clerk for Cambridgeshire.

Professor Jackson is better qualified for this task than anyone else I can think of. His realistic approach to problems of legal administration first became evident in his *Machinery of Justice in England*. Not only is he a magistrate of long standing himself, but he spent a number of years in the Criminal Division of the Home Office at a time when that department was more closely concerned with the work of the magistracy than it is today, and as a result he became secretary first to Lord Roche's committee on Justices' Clerks, and afterwards to the Royal Commission on Justices of the Peace. He has watched and taken part in the developments which followed from the Reports of these Committees, so that he speaks as an active participant in the work of the magistracy as well as an understanding and sympathetic student of the system, but one who is prepared to be critical where necessary. And he has had the technical assistance of an experienced clerk. In the result, there is very little which a newly appointed and aspiring magistrate needs to know which he will not find explained in these pages.

From what I have already said it will have been gathered that the greater part of the material in the book is new. Professor Jackson has kept as much of the original as was practicable, sometimes even preserving out-of-date passages for the purpose of bringing out how important the recent developments have been. Fortunately, he has something of Sir Leo Page's clarity of style, and the dovetailing has been so skilfully carried out that the joints seldom jolt the reader—a noteworthy exception occurs on pages 147–148, in connection with fines, where the requirements about the granting of time for payment are set out twice. From time to time there is a sharp difference of opinion between author and editor, as in the chapter on Evidence on which Sir Leo took up a rather orthodox position while Professor Jackson is an adherent of the more common-sense modern school: while he expresses his view about such decisions as that of the House of Lords in *Myers* v. *D.P.P.* ([1964] 8 W.L.R. 145) with a "brutal simplicity," describing it as "a bit of old-fashioned nonsense," he sets out the Leo Page standpoint both clearly and understandingly. The two chapters on Evidence indeed throw

a flood of bright light into the gloomy mysteries of this subject, which may well make some young magistrates think that they know what it is all about, only to be disillusioned when next they hear an argument by two lawyers about the hearsay rule.

Among the other "new" subjects which may be mentioned are the training of magistrates: it is to be hoped that this book will be treated as a "must" by those who are responsible for the arrangements for this: also sentencing, not that much of what Sir Leo Page wrote on this subject is not still highly relevant, but that the new possibilities opened up under the Criminal Justice Act 1948 and later statutes and orders are so extensive and important that two chapters, and excellent ones, are now required even for an outline discussion of this, which is surely of as much importance as the subject of the trial itself.

There is substantial rewriting in all the chapters, both those which are basic such as Practice and Procedure, and those which are more auxiliary such as those on Juvenile Courts and Domestic Proceedings. The useful chapter on Chairman and Clerk should be noticed. As a result of the remarks of Lord Goddard C.J. in the *East Kerrier Justices Case* ([1952] 2 Q.B. 719), which were not sufficiently carefully considered, the question of the retirement of their clerk with the justices has been given a consideration possibly more detailed than it requires: certainly it caused quite a stir.

As one would expect with Professor Jackson some of the views expressed are very personal, and will not be acceptable to many experienced magistrates and chairmen. On the other hand, he is sometimes surprisingly ready to accept the not too well based views of High Court judges without discussion. A good example is Lord Parker's dictum that defence certificates should be granted in all cases where the defendant's means do not enable him to pay for legal aid. This is clearly wrong. The test laid down by the statute is "the interests of justice"—if Parliament had intended to establish the means test as the sole test it would have used words appropriate to that end. Lord Parker's dictum is a good example of the danger of the *ex cathedra* statement made without the advantage of an adequate argument addressed to the court by the bar which, after all, is possibly the most solid basis of what Professor Lawson called "the rational strength of the common law."

C.

THE CONTRIBUTION OF ENGLISH LAW TO SOUTH AFRICAN LAW; AND THE RULE OF LAW IN SOUTH AFRICA. BY THE HON. O. D. SCHREINER. The Hamlyn Lectures, 19th series. [London: Stevens and Sons; South Africa: Juta & Co. Ltd. 1957. xii and 105 pp. 30s. net.]

QUITE a juristic war has come into existence among South African writers on legal topics in the last decade due mainly to certain decisions of the highest courts in the Republic, wherein the judges have indicated a disposition to get rid of certain of the elements of English law which the modern South African law contains, especially in the law of delict. Prior to these decisions there were lawyers who, on nationalist political grounds of the narrowest chauvinism, expressed dissatisfaction with the foreign elements in the law which were drawn from a variety of sources. The general body of lawyers had taken these sources for granted and never seemed to find in them any disadvantage or defect. In fact, the influence of such sources, and, in particular, that of the English law in the development of modern South African law, has been widespread and profound. To the reviewer, not only has the effect been to bring the antiquated and rather inflexible principles of the Roman-Dutch system into the twentieth century, but something of value and interest to civil and common law lawyers alike has been produced. The result has, in many

areas of the law, been an effective welding of the concepts from both general systems, and it is not, perhaps, too much to suggest that international lawyers and others, looking for a general law of mankind (in the sphere of arbitration among others), might examine the principles of the modern South African law with some advantage. With these thoughts in mind, the reviewer directs the attention of readers to the first of the two Hamlyn Lectures. This provides an authoritative survey of the specific areas of South African law which have been influenced by the English law and is a classic to which, without doubt, lawyers will wish to refer in many comparative contexts. They may do so with the secure knowledge that the Lecturer, a retired judge of appeal, and one of the most eminent of the judges produced in this century in the British Commonwealth, has not only the experience but also the deep learning required for the formidable task he has so successfully accomplished. There is in this lecture food for thought for legal specialists in many comparative fields.

It is the reviewer's great regret that the second lecture on the Rule of Law in South Africa cannot be recommended with the same high praise. The reviewer, after many years of regular appearances before the eminent judge in his court, has been aware of, and even grateful on occasion for, his Lordship's firm and deep-seated liberalism. His humanity towards the unhappy lot of the African people in South Africa is well known but it is a humanity which he demonstrates but weakly here in a technical legal judgment far removed from the reality of the human situation. The duty of a judge is to apply the law, and this duty, however harsh and unrewarding a task it may be in a country torn with racial strife and under the constant shadow of the gallows, must be carried out. To the Lecturer, as lawyer and judge, whatever the content of the law, however harshly it may bear on the subject, the sacred duty of those enjoined to enforce it (whether judicial officer or administrative official), and of those on whom its burdens fall, is to observe the law. If the law is bad, the remedy lies in its alteration by means constitutional and lawful. This legalistic approach severely limits the field in discussing the problem whether the apartheid laws of the Republic constitute a breach of the Rule of Law, for basic to the Lecturer's reasoning is his examination of Dicey's concept of the Rule of Law. His conclusion is that its scope and meaning must be narrowly confined to the main proposition that

> "no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary courts of the land. In this sense (Dicey continued) the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary or discretionary powers of constraint."

The point is that Dicey's concept is confined to the proposition that the law is supreme in the sense that ordinarily people are or should be punishable only if they contravene general rules of the common law, or general rules made either directly by the legislature itself, or indirectly under delegation.

"That," says the Lecturer, "is the sense in which the Rule of Law covers what Dicey said, and the sense in which it is still most valuable today." And that is the sense in which the Lecturer proceeds to examine the laws of apartheid.

Now, it is well known that the meaning of the Rule of Law in our time has been discussed by the International Commission of Jurists at Athens in 1955, at Delhi in 1959, and at subsequent congresses. The Delhi final resolution "recognises that the Rule of Law is a dynamic concept for the expansion and fulfilment of which jurists are primarily responsible and which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realised."

The Lecturer, while approving of the sentiments of this resolution, considers that it confuses the issues of politics and law, "the cause of justice in

the widest sense . . . a popular slogan, advertising as it were a universal remedy" and "the relatively narrow, earlier meaning" of Dicey which is generally accepted with minor variants. And so, let it be repeated, the Lecturer proceeds to examine the apartheid laws of South Africa on the latter, narrow test; and he does so, having referred critically to the statement of the present South African Prime Minister (in reply to criticisms that certain actions had infringed the Rule of Law) to the effect that there are as many concepts of the Rule of Law as there are persons, that the Rule is used as a pretext for attempts to frustrate action against communism, and that Parliament, being sovereign and freely elected by secret ballot, could make what laws it wished to bring about an efficient administration, the maintenance of law and order and the safety of a well-established state.

It is necessary to proceed then to the main part of the lecture, understanding that the Lecturer as a rational human being must be clearly distinguished from the rationalising lawyer and judge examining the issues on what your reviewer regards as an entirely artificial basis, the original narrow concept of the Rule of Law introduced by Dicey. It is difficult to understand the Lecturer's motives, his purpose in this limited analysis which, above all else, divorces the lawyer and the content of laws from the people for whose well-being, presumably, laws are made.

Limitations of space do not permit an exhaustive discussion of the Lecturer's treatment of the specific laws of apartheid. However, the following selected passages give, it is felt, the full effect and flavour of the Lecturer's conclusions.

On Dicey's second proposition, equal treatment of all before the law, the Lecturer says: "In certain limited respects, then, there is racial discrimination before the law, which may fairly be said to infringe the Rule of Law in the way mentioned in Dicey's second proposition. But this fact, though not unimportant, hardly warrants a general conclusion that apartheid, as such, involves inequality of a kind that brings it within that proposition." And again: "The real case against apartheid at the present day is not that there is inequality in the administration of the law, for in general there is not, but that it is harsh, unfair and increasingly difficult to support in the light of the growing industrial development of our country and in the light of modern views on the treatment of other races. With the minor exceptions, however, that I have mentioned I do not think that apartheid falls within Dicey's second proposition or, consequently, that, as such and taken as a whole, it infringes the Rule of Law."

Regarding whether the Rule of Law is infringed by "certain items of legislation . . . from the angle of the invasion of individual freedom . . ." the Lecturer points out that: (a) There are "laws impeding the freedom of movement of Africans in, into and out of urban areas, and also in rural areas outside the African reserves . . ." so that "the African is widely restricted in his movements without his having been convicted of any offence"; and "Indians . . . have not full freedom of movement [while] the rest of the population generally comes and goes as it pleases, subject to prohibitions on entry into areas restricted to persons of another race." (b) There are extensive powers of banning, not confined to Africans, under the Suppression of Communism Act 1950, relating to organisations and persons, the latter "usually last for five years and generally restrict movement . . . sometimes . . . to the dwelling where the person affected lives . . . allow him to go to work but he may have to report regularly to the police . . . commonly banned from attending any gatherings, even social ones . . . not . . . allowed to receive visitors except his lawyers . . . if they are themselves not banned. . . ." (c) There are various powers of arrest and rearrest, *e.g.*, on suspicion of subversive activities, and detention for questioning for periods varying from 14 to 180 days depending on the contingency; the power to refuse bail rests with the prosecutors as delegates of the Attorney-General, the court being specifically precluded from interfering with such a refusal; and "a person who

is imprisoned for various kinds of subversive action may be prohibited by the Minister of Justice from absenting himself from prison for successive periods of up to twelve months each, after serving his term of imprisonment [so that] his period of imprisonment may be extended even to imprisonment for life without further offence or sentence."

All these drastic orders, the Lecturer concludes, are made under the express authority of laws which are in form unexceptionable and the validity of which cannot be challenged on any ordinary legal grounds—for Parliament is sovereign. Nevertheless, they severely interfere with the liberty of the individual without a court order against him in pursuance of some complaint of an alleged breach of a legal rule or precept; and the officer in whom the powers are vested acts upon information which is not tested in a court of law and may well be wrong. *These statutory provisions and the action under them infringe the Rule of Law, but this does not mean that there has been any illegal executive act, for "the Rule of Law" is not a legal rule but a statement of principle.*

To the reviewer it seems that at this stage there emerges the inevitable conflict between the rationality of the Lecturer as a human being and his rationalisations as a lawyer and judge based on Dicey's narrow concept of the Rule of Law.

The italicised conclusion is incomprehensible in the light of his view regarding Dicey's meaning to which he seems, however, to revert again in the next two sentences of the lecture: "The charge that the Rule of Law has been infringed is a political charge, not a charge that the law has been contravened. And so the answer must necessarily be a political and not a legal one." Alas, once again the Lecturer becomes the victim of his artificial legalities in his next sentence: "Actually, however, the South African answer follows in shape the lines of a legal defence to a legal charge . . . whether established infringements of the Rule of Law are excusable on the ground of emergency," since the South African Government contends that the safety of the state requires action of the kind taken. Unhappily, this unfortunate line of reasoning is exposed in its true, though no doubt genuine and subconscious, subjectivity to which, it seems, even the most eminent judges may be susceptible.

Maintaining his adherence to the distinction between law and politics (thus separating law and human beings) to his concluding sentences The Hon. O. D. Schreiner, reflecting on the world unpopularity of his country (which might be due, *inter alia*, to the factor of "envy of the country's wealth, so strongly based on rich mineral resources and a hard working and capable labour force") and its vulnerability "to guerilla infiltration and other subversive activities," ends his lecture as follows:

> "Difficult problems thus raised have to be solved by statesmen. Lawyers who are not active in the world of politics can only observe the facts and emphasise the great importance of completely restoring the Rule of Law [Dicey's narrow concept] as soon as possible before, as individuals, we lose our sensitive appreciation of its extreme importance, and before, as a country, irreparable damage is done to our internal race relations and to our external reputation and safety."

One can only speculate what the Trustees of the Hamlyn Trust had in mind when the Lecturer was invited to deliver this second lecture—whether a full and robust examination of the laws of apartheid was anticipated from this respected and progressive white South African, or an inhibited and technical review based on the limited nineteenth-century concept of Dicey about the Rule of Law. And is this part of the contribution of English law to South African lawyers?

LEONARD LAKER.

THE OXFORD LAW SCHOOL: 1850–1965. By F. H. LAWSON. [Oxford: The Clarendon Press. 1968. viii and 268 pp. 55s. net.]

THIS book, handsomely produced at a reasonable price, had its origin in the opening of the new Bodleian Law Library in 1964, which, it was suggested, might provide a fitting occasion for the Oxford Law Faculty to publish a history of the school. For various reasons publication has been postponed, but the delay has enabled Professor Lawson (and let it be said at once that nobody else could have written this book) to publish a work which is a model of its kind. All aspects of the history of the institution over a century are covered and, although the tone throughout is naturally warm and enthusiastic, weaknesses and difficulties are faced, and the book nowhere degenerates, as such works are apt to do, into an exercise in public relations. Throughout there is evident what the Preface to the first edition of *Cheshire and Fifoot on Contracts* called Professor Lawson's gift for "a quick and penetrating observation." Although it is the history of an institution with all the details relating to the structure of courses which the Department of Education and Science could require in one of its questionnaires, it is seen throughout in terms of personalities. It is all very Oxonian. Indeed, as everyone sees an institution, particularly one with which he has been connected, from his own point of view I hope that a certain autobiographical tone will be pardoned in this review. I recall some sentences which Professor A. P. D'Entreves used when reviewing *Oxford Essays in Jurisprudence* in (1968) 8 *Natural Law Forum* at p. 188: "I cannot help saying how much this work reminds me of the unforgotten atmosphere of Oxford. There is much conversation going on there, much collaborative work. But there is also a certain amount of secretiveness and solitary enterprise. This book might be taken as an example of both." (The book does not, incidentally, mention Professor D'Entreves, who, though never a member of the Oxford Law Faculty, and indeed a somewhat unsympathetic observer of it, published an excellent book on natural law—how Oxonian that is.)

The book traces the history of the law school since the formation of an independent honour school of jurisprudence in 1870. There are seven chapters, entitled: 1. The origins; 2. An independent school; 3. The age of the professors; 4. The rise of the tutors; 5. Between the wars; 6. Mid-century; and 7. Law libraries. Chapter 7 is naturally devoted to the magnificent new law library, the finest outside the United States, which was erected—mainly with the aid of American and Commonwealth money—in 1964. Much fascinating material is also contained in a number of appendices. For each of the periods of the school's history there are given examples of examination papers, lists of books published by members of the faculty and other miscellaneous matter, such as the movements of faculty members in and out of England, and the new curriculum of the Final Honour School.

In a work of this kind omissions or alterations of emphasis must be largely a matter of personal choice I myself would certainly have said more about the weekenders who assist in college teaching than the colourless reference on page 149 (there is no entry in the Index). I have been on Oxford Station platform at six o'clock on a Friday evening and counted half a dozen junior members of the Bar (no solicitors) coming up from London to assist with teaching on Friday night and Saturday morning. (Oxford is not and never has been devoted to the five-day week. Saturdays and Bank Holidays were working days so far as dons and pupils were concerned.)

I should also have said more about the Law Club than is contained in the rather cryptic reference on page 104. This brought together Oxford dons and such judges as were Oxford men in circumstances of conviviality and so helped to bridge whatever gap once existed between the practitioner and the academic. (I recall C. V. Davidge of Keble, who had for long held the position of secretary of the club, saying to me: "You create by writing books, I create by running the Law Club.")

I should also have said more about Oxford examining. On page 176 it is rightly described as "painfully conscientious" and its burdens are also indicated, though very briefly, in the footnote on that page. I have examined in many other universities in the British Isles and elsewhere but never encountered examining which was as scrupulously careful as that at Oxford. It is certainly surprising to find such a very brief reference (pp. 147 and 172–178) to the institution of the *viva voce*. In my time a third of the candidates in the Honour School of Jurisprudence could rely on having an oral examination to determine the fate of their class in the final degree. The convention was that the candidate could have his position improved though not worsened by a *viva*. The burden of reading 400 examination scripts, together with that of spending a further week in *viva voce* examinations often lasting from 9.30 in the morning until late in the evening in the stagnant atmosphere of Oxford in July, was very great. But I have no doubt that the price paid was well worth it in ensuring justice to the candidates. *Vivas* were always taken very seriously by everyone concerned, examiners, tutors and pupils, and more space might have been devoted to them. For it is one of the paradoxes of Oxford examining, for the B.A. as distinct from the B.C.L., that its burdens prevent the University from securing external examiners as other universities do. Hence its peculiar strengths and successes are not as well known as they might be. A factor in the success of Oxford examining which Professor Lawson does mention is that the examiners are very often, indeed almost invariably, not those who have lectured or conducted tutorials in the subjects. The size of the faculty together with the dispersed and individual nature of Oxford teaching prevents anything in the nature of a "play-back" from student to examiner.

Oxford, as the Report of the Franks Commission pointed out in 1966, is primarily based on reading and writing and not on listening. This means that the lecture is not regarded as an important activity, whereas the tutorial or seminar is. More might have been said about this characteristic Oxford institution, and some comparison drawn with the Cambridge supervision. I missed in particular any reference to the striking difference that in Oxford the pupil reads the essay aloud to the tutor, whereas in Cambridge the written work is submitted beforehand and corrected by the supervisor. In Oxford, in recent years, there has been a distinct drift away from the written essay in favour of other methods of instruction, but it still remains the backbone of the Oxonian system—if anything so individualistic can be described as a system. Something might have been said about the reports which in recent years it has become the custom for examiners in the Final Honour School to circulate to the college tutors about the way in which the questions have been answered. There is a reference to the recent growth in coaching by college tutors and in particular to that institution beloved of the weaker man—the reading list, or list of periodical articles and cases which must be mastered. (I well recall a conversation with a very weak pupil who told me that he was unhappy at Pembroke and wished he was at Magdalen. When, perhaps unwisely, I pressed him for reasons, he replied: "At Magdalen they are given much better reading lists than at Pembroke, and are also taught how to answer examination questions.")

Although the lack of power in the board of the faculty is mentioned (p. 162), and the individuality of college tutors is stressed throughout, together with their former refusal to "indoctrinate" (p. 176), it might be said that even more emphasis could be placed on the centrifugal aspect of Oxford law-teaching and the absence of central professorial power. Professors at Oxford had and still have only such power as personal prestige entitles them to. The new Law Library may well change much of this, as Professor Lawson recognises, for it provides for the first time something in the nature of a faculty centre.

The growing specialisation of members of the faculty is noticed. When I became a member of it in 1947 I was struck not only by the isolated position

of the individual college tutor (then it was very rare for any college to have more than one law tutor, and a year might go by without talking to, or even seeing, some of one's colleagues), but also by the number of subjects each tutor was supposed to and did teach. In one year I taught seven out of the eight subjects in the Final Honour School. Looking back I cannot think that this was a good thing, although it had certain advantages in discouraging unnecessary specialisation by both tutor and pupil. Another consequence was that the "workload," to use the phrase with which we are now becoming familiar, was heavy—at least twelve and often fifteen or eighteen hours per week. It will be recalled that the Franks Report found that the Oxonian teaching load was twice the national average. Another consequence was that in seventeen years in Oxford I never, uninvited, entered the room of a colleague in the morning: I would have assumed that he was working. I have noticed a different practice in the other universities with which I have been connected.

The book is very informative on matters outside the structure of undergraduate teaching. Much space is rightly devoted to the B.C.L. and the contribution to it of Rhodes scholars. As I never taught for or examined in the B.C.L. my comments are of little value—though in the characteristic Oxonian way I was for two years chairman of the body responsible for the nomination of its examiners. I thought that a little external advice might be helpful and was responsible for nominating one of the few external examiners in the B.C.L. who was not an Oxford man. His suggestions, made informally, were most interesting, and many of them were incorporated in the reforms later adopted—see p. 156.

The B.C.L. and the D.C.L. have been a success. Not so the other graduate degrees such as the D.Phil. and the B.Litt. Professor Lawson records (p. 160) that on the whole "graduate students are left to fend for themselves, and often take some time to accustom themselves to the Oxford scene. Moreover, the standards of supervision have not always been rigorous." Occasionally this has painful results when someone who has spent two to three years at Oxford is obliged to go away empty-handed or perhaps without the degree for which he was originally a candidate. There will be many at home and overseas who will wince at Professor Lawson's statement (p. 159) that the B.Litt. "has in practice become a second-class research degree for persons who have not already obtained an Oxford degree." The isolation and frustration of the graduate student is not confined to the Law Faculty. Readers of the Franks Report will recall uneasily the many expressions of bitterness which emanated from this class of persons.

The personalities in the history of the faculty are sketched with a masterhand. Charity and acuteness of observation combine in the judgments. Pollock's greatness as a jurist is duly recognised but "none of his colleagues approached his uselessness as a teacher" (p. 78), and "it would have made little difference to the teaching of law in Oxford if Pollock had never been there." An attractive don was one (p. 107) who "was somewhat of a grand seigneur, who had married into the Anglo-Irish gentry, and admitted that he husbanded his strength," or another who, because he was "the son of a half-Spanish father and an Irish mother," was fortunate enough to have "the most easy and attractive manners," which were yet "compatible with complete sincerity." Another don (p. 78) was "a Cornishman of a strong and even brutal type, with a caustic tongue and a hatred of pretence," who had also—perhaps surprisingly—in his youth been a Wykehamist "who had on three occasions been the hero of the Eton cricket match," but "was a man of one book." Less eminent was another who "had been a well-known racing cyclist and was a fine Spanish scholar" (p. 107), or yet another who "had a passion for field sports, and was a good violinist."

But the Oxford faculty has never been inbred. In one of the most fascinating of his many appendices (no. 9) Professor Lawson gives a list of past or present law teachers who received their previous academic training outside

England, and also of those who taught law abroad. It is worth studying this appendix against the statement in the Wilson Report on Legal Education that over half the law teachers in England are teaching in the university in which they originally graduated. Real scandals or passengers amongst the faculty have been surprisingly rare. Even the "sinister and ambiguous" figure of A. T. Carter was able enough for Lord Chancellor Birkenhead to consult him in confidence on legal matters. The list of publications speaks for itself of the international reputation of the faculty.

It is hardly accurate to say that the management of the Eldon Scholarship "was vested in a body of noblemen and gentlemen unconnected with the University" (p. 12). During the ten years in which I was a trustee half of the trustees were composed of such Law Lords as were Oxford men presided over by the Lord Chancellor of the day (Lords Kilmuir and Simonds), and the other half of Oxford dons, of whom I recall Sir C. K. Allen, Mr. J. B. Butterworth, Dr. J. H. C. Morris and Professor C. H. M. Waldock. I should also have mentioned the fact that the Lord Chief Justice of England used to be one of the rather variegated body of electors to the Vinerian Professorship of English Law until, quite wrongly, as I thought, the electoral committee was reconstituted along more orthodox academic lines. It is fallacious to assume that dons are necessarily the best judges of their fellow academics, and there was no evidence that holders of the office of Lord Chief Justice had failed to take their duties seriously. Indeed, having since seen the papers of Lord Caldecote relating to the election to the Vinerian Chair in 1944, I can affirm that at least one Lord Chief Justice took his duties with great seriousness. There might also have been mention of a visitor to Oxford who was singularly unimpressed by the Law Faculty, Professor D. A. Binchy, whose article published in *Studies* for September 1949 has a wounding reference to "the opera bouffe of the Honour School of Jurisprudence playing to crowded houses."

There are a few minor errors. On page 97 something has gone wrong with the caption to the photograph of Lord Bryce; on page 108 there ought to be a reference to the *Casebook on Land Law* produced by Maudsley and Burn; on page 144 there should be a reference to Mr. Justice Ritchie of the Supreme Court of Canada, a former Rhodes scholar of Pembroke; and on page 261 the list of law teachers who have had their legal education in Eire should contain a reference to Professor J. M. Kelly.

R. F. V. HEUSTON.

ROMILLY. BY PATRICK MEDD. [London: Collins. 1968. 318 pp. (with index) 42s. net.]

ROMILLY was an interesting person and there is certainly room for a good biography of him. He was a distinguished member of the Bar who held office as Solicitor-General for only a few months in 1806. His chief claim to fame is his work for the reform of the criminal law. It is true that he was unsuccessful in most of his attempts to persuade Parliament to modify the rigour of the eighteenth-century Penal Code, but this does not detract from his claim to be considered one of the foremost of the reformers of English criminal law. He was also, as is plain from the memoirs of his contemporaries, a person of peculiar charm of character, deeply respected by his opponents as well as his friends. Mr. Medd places Romilly firmly in his historical setting of the revolutionary and Napoleonic Wars and gives an interesting and readable account of his family life and friendships with the prominent men of the period both in England and France, such as Lansdowne, Bentham and Mirabeau. (Is it possible that English barristers have become more insular in the past century? How many members of the English Bar today are on familiar terms with the intellectual élite of France?) Mr. Medd has a clear if rather old-fashioned style and is not above stressing the obvious: "The

habit of touring the countryside as a form of enjoyment was then in its infancy, and until the second half of the nineteenth century, when methods of transport had improved, it was not the popular pastime that it later became" (p. 247). Romilly is something of a hero to his biographer, no doubt rightly, but this means that some of the incidents in his career tend to be glossed over. For example, one would like to have known more about the reluctance of the great reformer to support the reform of the Court of Chancery in which he was a leading practitioner with a large income. But the readers of a learned periodical will not be interested primarily in a pleasant retelling of facts and incidents already well known. They will seek to inquire what the book adds to scholarly knowledge. Here it is not easy to be just to the author. He quotes (p. 305) a statement by Duff Cooper that "footnotes tease the eye and disfigure the page" (there is no reference given for this quotation, but no doubt Duff Cooper did say something of the kind). It is therefore almost impossible to tell how much of the work is based on existing sources and how much is new. As Mr. Medd expressly states that Romilly's private papers were destroyed during the war it is reasonable to assume that what is new is comment rather than fact. On the whole this impression is confirmed by such of the pages as have been checked against the *Memoirs of Sir Samuel Romilly*, by his sons, published in three volumes in 1840. Those who are fortunate enough to possess the one-volume biography by C. G. Oakes published in 1935 may well wish to retain it, for that author provided references for his quotations. It is perhaps significant that in Mr. Medd's short bibliography there is no reference to the volume of Holdsworth's *History* (Vol. 13, pp. 247–281) in which Romilly is accorded Holdsworth's usual full and careful treatment, and also that the name of Professor Radzinowicz is misspelt. It can be said with confidence that Mr. Medd's treatment of Romilly as a reformer of the criminal law suffers badly by comparison with Dr. Radzinowicz's exhaustive discussion in Volume 1, Chaps. 10 and 16, of his History.

One final example may illustrate the author's methods. Most legal readers will probably be aware that Romilly's argument in the leading case of *Huguenin* v. *Baseley* (1807) 14 Ves. 273 is widely admired and that the decision itself is the foundation of the law relating to setting aside gifts on the ground of undue influence. There is no Table of Cases but there is one reference in the Index to the decision on page 110, where the facts of the case are set out, and an extract given from Romilly's argument. The author does not give any reference to the report of the case, makes no reference to Lord Eldon's judgment, nor to the several dozen cases in which the decision has been cited with approval, and misspells the name of the defendant. It remains to say that the book has been beautifully produced by the publishers at a very reasonable price.

R. F. V. Heuston.

THE JUDGE AS LAWMAKER. By FREDERIC REYNOLD. [London: MacGibbon & Kee. 1967. 94 and (index 2 pp. 21s. net.]

MR. REYNOLD looks with a cold eye on some of the recent essays in law-making of the House of Lords, and he is particularly concerned at the majority decision in *Shaw* v. *D.P.P.* [1961] 2 W.L.R. 897 affirming the existence of the offence of conspiring to corrupt public morals. In his dissenting speech Lord Reid instanced the situation of two or more persons (who might include the prostitute) combining to issue an invitation to resort to a prostitute and declared that to argue that they were guilty of the offence was a novel doctrine. For Lord Reid it was the responsibility of Parliament, not of the courts, to determine the extent to which the law should punish immorality. On the other side of the spectrum was Lord Simonds asking whether the encouragement of homosexual conduct between adults when that conduct ceased to be an offence

was not something which the courts could punish. In what Professor Hart has called "a fine specimen of judicial rhetoric in the baroque manner," he concluded that the hand of the common law was still powerful and that it was for "Her Majesty's judges to play the part which Lord Mansfield pointed out to them."

Mr. Reynold is on the side of Lord Reid, as indeed were practically all informed commentators, but he goes further. In *Shaw* it was common ground between Lord Reid and the majority that a conspiracy could be criminal even if the "unlawful act" in question would not in itself be a criminal offence if committed by one person alone. Mr. Reynold calls this an extraordinary proposition deriving from "the elastic policy of Star Chamber of casting its net wide in troubled waters." A well-known example of that sort of conspiracy is agreeing to injure a man in his trade if done without justification: in *R.* v. *Willetts*, 70 J.P. 127, it was held that conspiracy to make pirated music for sale and to obtain profits from it was indictable as a conspiracy to deprive the owner of his copyright. On this aspect, generally, "the law seems to be haphazard," as Lord Reid said, and there is much to be said for the contention that civil remedies are sufficient. Certainly, extension of the use of this offence should not be encouraged if only for the reason that it imports uncertainty into the criminal law.

The decision of the Lords in *D.P.P.* v. *Smith* [1960] 3 W.L.R. 546 is also attacked. However, what has been widely regarded as a considerable judicial solecism in the definition of imputed malice has been briskly buried by Parliament (implementing a recommendation of the Law Commission): Criminal Justice Act 1967, s. 8.

The author also considers such cases as *Gollins* v. *Gollins* [1964] A.C. 644. Throughout, he makes his points with cogency and agreeable vivacity.

FLORENCE O'DONOGHUE.

ADMINISTRATIVE LAW. By J. F. GARNER, LL.D. Second edition. [London: Butterworths. 1967. xli and 485 pp. including index. 68s. net.]

IN this second edition Professor Garner brings his *Administrative Law* up to date accurately and very thoroughly. The new developments are discussed fully and woven into the text so skilfully that the seams do not show. So many recent developments both great and small are incorporated that it may seem ungrateful to pick out some that are missing. But *R.* v. *Industrial Injuries Commissioner, ex p. A.E.U.* (*No.* 2) [1966] 2 W.L.R. 97 does seem to be an important omission. For in this case the court had to face the problem which the Franks Committee left open when they recommended that no appeal on a point of law should lie from the Industrial Injuries Commissioner (now amalgamated with the National Insurance Commissioner: see National Insurance Act 1966) but allowed practically the same result to be achieved by way of certiorari for error of law on the face of the record. If every interpretation of "out of and in the course of employment" were to be treated as a question of law the wheel would come back almost full circle to pre-Beveridge days. In the *A.E.U.* case the court steered a midway course between the Scylla of making the Commissioner superfluous and the Charybdis of abdicating control. To change the metaphor, the courts have to wield "the knife of policy" whenever they exercise control over administrative action. Statutes cannot be interpreted in a vacuum. Nowhere is this illustrated more vividly than in the difference between the majority and Lord Denning's dissenting judgment in *Webb* v. *Minister of Housing and Local Government* [1965] 1 W.L.R. 755, a case which Professor Garner dismisses in two lines. It is also demonstrated in the change of attitude of the courts to questions of jurisdictional fact between *White and Collins* v. *Minister of Health* [1939] 2 K.B.

888 and *Ashbridge Investments Ltd.* v. *Minister of Housing and Local Government* [1965] 1 W.L.R. 1320, a case not mentioned by Professor Garner. This same problem of controlling the administration without acting as a court of appeal confronts the Ombudsman when he has to draw the line between the "merits of a decision" and "maladministration," a distinction which is briefly discussed in this book but provoked a good deal of debate in Parliament.

In short the second edition, as the first, is a well-balanced account of the law as it is rather than a discussion of the policy issues underlying it.

G. GANZ.

THE MODERN LAW OF REAL PROPERTY. Tenth Edition. By PROFESSOR G. C. CHESHIRE, D.C.L., LL.D., F.B.A. With the material relating to the Rent Acts and Security of Tenure, Registered Conveyancing and Town and Country Planning revised by J. D. DAVIES, B.C.L., M.A., LL.B. [London. Butterworths. 1967. lxvii and 901 and (index) 56 pp. 75s. net.]

When in 1925 Professor Cheshire first wrote this now classic work on Real Property, he "admitted that the bulk of real property law is greater now than it formerly was" but hoped that in twenty or thirty years' time the amount of law which a book on real property need deal with would be diminished. That hope has not been fulfilled for, forty years on, the book has grown in length by 15 per cent. If the law student of 1926 found unpalatable the need still to understand *Shelley's* case or the old rules as to remainders, how much more may the law student of 1967 initially recoil from the provisions of the Land Commission Act 1967 or the "formidable complexity" (Mr. Davies' phrase) of the Rent Acts? Yet, the accounts in this new edition of this legislation, though succinct, are readable and firmly set the new land law, always thought to be pre-eminently lawyers' law, in its social and economic context.

As regards the Perpetuities and Accumulations Act 1964, Professor Cheshire has contrived to give an account of the Act without expanding the total section of the book on this subject by more than seven pages. Moreover, he has done this by first stating the common law and then dealing separately with the Act. It is doubtful whether this treatment is entirely successful and the reviewer shares the fears expressed by Professor Cheshire in his Preface that he may have given too condensed an account of the 1964 Act. There are passages which are difficult to follow, for example, "a general power of appointment that may possibly be exercised beyond the perpetuity period and which is therefore void at common law, is to be treated as valid until it is established that it will not in fact be exercised at too remote a time —Act of 1964, s. 3 (2)" (pp. 266–267). This seems to be the opposite of what the subsection enacts. Again, "But, except where the option is one that entitles a tenant to purchase his landlord's reversion, which is exercisable throughout the continuance of the lease however long this may be, the only period applicable to an option to acquire for valuable consideration any interest in land is twenty-one years—Act of 1964, s. 9 (1) and (2)" (p. 267). Admittedly, there is in this passage a cross-reference to a later page where the matter is dealt with more accurately, but, standing alone, the passage might lead a student into thinking that the life or lives in being plus twenty-one years' period applies to an option given to a tenant. Moreover the rule applicable to an option given to a tenant is not confined to an option "exercisable throughout the continuance of the lease" but extends to options exercisable up to one year following the determination of the lease. Indeed the whole difficult subject of the validity of an option given to a tenant to purchase the freehold reversion tends to be scattered in isolated passages throughout the book, whereas it would be better dealt with in one place. The new application of the perpetuity

rule to possibilities of reverter is not adequately treated in the section on the 1964 Act, which fails to give a cross-reference to the pages in another chapter (pp. 283–284) where the topic is actually discussed.

Sometimes topics are treated in unexpected places. For example new material on tenancy by estoppel (not estoppel generally as the "blurb" on the cover suggests) is in the chapter on Mortgages rather than in the chapter on Leaseholds. A new admirably written couple of pages on laches in the chapter on Limitation unfortunately appears to be under the heading of tenancies. The seeker for knowledge on *positive* covenants will not find them indexed as such and will only eventually track them down under the heading of *restrictive* covenants. Section 40 of the Law of Property Act 1925 is principally commented on in the chapter on Leaseholds rather than under the heading "Contract of sale of land."

For all this, the new *Cheshire* perpetuates the tradition of a literary classic on a difficult branch of the law and will continue to lighten that obscurity with which English law must it seems overshadow our "green and pleasant land."

MICHAEL GOODMAN.

PRINCIPLES OF PROPERTY LAW. By D. C. JACKSON. [Australia: Law Book Company; London: Sweet & Maxwell. 1967. xxvi and 418 pp. £5 5s.]

THE author, who is the Sir John Latham Professor of Law at Monash University, has written an interesting and important review of the general principles of property law, which is also an attempt to present a unitary study of the area that we label "property." He believes that the study of real and personal property in separate departments is theoretically and practically misleading, and that it should be possible in the property area to trace applications of general principles back to the principles themselves. His long-term aim is to follow this book with one examining the application of the general principles in detail, concentrating then on particular relationships and transactions.

His central theme is the suggestion that whether an interest is proprietary or personal should be judged according to the criterion of *whether* it can be enforced rather than *how* it can be enforced. The further application of this criterion leads to a hierarchy of proprietary interests.

Therefore, one of the fundamental questions tackled by the study is the meaning of "proprietary interest" when used within the area called "property." Subdivisions of this question which the author attempts to answer are: (i) What criteria do we, or should we, apply in deciding whether an interest is "proprietary," and what are the consequences of so deciding? (ii) Who can hold and deal in proprietary interests, and how can such interests be acquired? (iii) How can such an interest be prevented from coming into existence or lost since it has been created? (iv) What are the remedies available to a claimant to or a holder of such a interest?

In Chapter 2, dealing with the classification of interests, he points out convincingly that with the advent of proprietary interests in all kinds of objects the distinction between real and personal property has lost any helpful meaning. This is mainly due to the fact that the division is based on nothing except a difference in the nature of objects of the legal system based rather on the method than on the extent of the protection of interests. The artificiality of the distinction based on the nature of the object is emphasised by the doctrine of conversion whereby for some legal purposes real property is considered personal or vice versa. He criticises the recent decision of the Privy Council in *Commissioner of Stamp Duties (Queensland)* v. *Livingston* [1965] A.C. 694 for concentrating on the mode of enforcement and placing it

higher in the scale of values than the ability to enforce it. In his view therefore the proprietary concept should be based on how widely an interest may be enforced rather than on how it can be enforced. He therefore attacks the traditional division of the study of property law into real and personal in that it depends for its validity today on the acceptance of the view that the ability to recover the interest in the object in dispute is a fundamental element, the presence or absence of which dictates the category of the interest. He regards the two major defects of this distinction as being that it emphasises the element of recovery of interest rather than the width of operation of the interest and that it is positively misleading since the recovery of the interest is not now restricted to real property. Thus a beneficiary under a trust is able, to a limited extent, to "follow" objects held on trust. Further, a distinction based solely on whether the interest lost can be recovered gives no hint of the system of "graduated" interests, which admits that a person may have an interest which the courts will protect against B but not against C. Therefore, he concludes, it is important not to confuse the legal distinction between proprietary and non-proprietary interests with a physical one from which flows no essential legal consequences.

It is difficult to give an adequate survey of each chapter owing to the complexity of the author's material. In Chapters 3, 4 and 5 he gives an historical survey of the development of proprietary interests, considering both law and equity and the intervention of statute and registration schemes. Chapters 6, 7 and 8 deal with Consideration and Value as Elements in the Scheme of Proprietary Interests; the concept of Sole and Joint Ownership; and the principles upon which whole proprietary interests are divided, including present and future interests.

Part II of the work deals with subjects of the legal system and the general principles involved in the limitation of capacity imposed by infancy and the effect of debilitating characteristics such as mental illness. Part III covers the creation of proprietary relationships, including those created by, and those created independently of, a purported transfer. Part IV deals with the prevention and loss of proprietary interests including terminations, and rescission on external and internal grounds. Finally Part IV covers the remedies protecting proprietary interests, dealing with general principles and then particular remedies such as declaration, injunction, specific performance and recovery of interests by action, including tracing.

Professor Jackson has performed a difficult task in applying a mixed analytical and functional method to the principles of property law and has arrived at something of a philosophy of the subject. The only other recent attempt, on a smaller scale, is Professor Lawson's *Introduction to the Law of Property*. That, of course, was intended for newcomers to the subject, whereas the present book should appeal to those who already have some detailed knowledge of property law, and is probably intended for a post-graduate public. At any rate it can be thoroughly recommended as an adventurous exploration of a relatively untouched area of law.

J. E. TRICE.

THE LAW OF BOUNDARIES AND FENCES. By V. POWELL-SMITH. [London: Butterworths. 1967. xlii and 145 and (index) 18 pp. 87s. 6d. net.]

THIS new book is a painstaking pot-pourri culled from all conceivable sections of the law that could possible relate to boundaries and fences, including the Occupiers' Liability Act 1957, title by adverse possession, and numerous esoteric statutory provisions such as those of the Ordnance Survey Act 1841 and the Railways Clauses Consolidation Act 1845.

An inevitable defect of such an omnibus collection is that some of the topics are treated too shortly and brevity causes error to creep in. For

example, in the section on adverse possession, there is ambiguity (at p. 13) in the use of the expression "possessory title" to registered land, the author presumably meaning title by adverse possession, the owner of which may be granted an absolute title (governed by section 75 (2) of the Land Registration Act 1925) and not that special form of title to registered land known as "Possessory Title" (governed, *inter alia*, by section 8 of the 1925 Act, which the author cites). The account (at p. 15) of the leading Court of Appeal case of *Williams Brothers Direct Supply Stores Ltd.* v. *Raftery* (1958) (not *Raferty* as cited by the author) is too short to be of value and the bare statement, "fencing did not avail the squatter," disguises the fact that the land was not fenced throughout the statutory period. Again, the author's statement (at p. 95) that "It is a well-established principle that where an animal escapes from land adjacent to the road, and does injury to a passer-by, the victim has no claim *unless negligence can be proved*": (reviewer's italics) is misleading, in view of the negation by the House of Lords in *Searle* v. *Wallbank* (1947) of a duty of care to prevent animals from straying. The author states (at p. 88) the rule that a right of re-entry for non-payment of a rentcharge "must apparently be exercised within the perpetuity period" but fails to add that this subjection of re-entry to the perpetuity rule has been abolished for rentcharges created after July 15, 1964, by section 11 of the Perpetuities and Accumulations Act 1964. There are also a number of uncorrected spelling and similar typographical errors in the book.

The author's thesis is that, "in all but the simplest cases, a proper survey and correctly drawn and accurate plan pays dividends, in spite of the additional expense involved." He cites with approval a dictum of Lord Kinnear (quoting from Professors Menzies and Bell) that, "It is the duty of the conveyancer in framing a disposition upon sale not to take for granted that he is to follow the exact terms of the description of the existing title, but to make full inquiry into the facts in order that he may be able to describe correctly the subject to be disposed." Is this not, however, from the vendor's point of view, a counsel of dangerous perfection? If the vendor merely contracts to convey, and in fact conveys, land described in terms identical with the parcels in earlier deeds, does he not then minimise the risk of being sued for compensation for misdescription or damages for breach of the implied covenants for title? Is not this risk increased if the vendor undertakes responsibility for a new description, increased in particularity of measurements and boundaries? Again, laudable though the practice of having a plan properly prepared by a surveyor might be, does this not risk giving rise to boundary disputes between neighbours who might otherwise have lived in harmonious ignorance of the exact legal status of their boundary walls and fences? As Mr. Powell-Smith himself says late in his book (p. 129), "It is frequently difficult to establish the ownership of a particular boundary fence, and generally the common-sense answer to an over-anxious client is to tell him to leave the matter to be resolved when trouble arises."

MICHAEL GOODMAN.

A GUIDE TO LAW AND PRACTICE UNDER THE CRIMINAL JUSTICE ACT 1967. By DAVID NAPLEY. [London: Sweet and Maxwell Ltd. 1967. 180 pp. including text of the Act and index. Paperback. 25s.]

MR. DAVID NAPLEY enjoys a high reputation as an able and experienced solicitor practising in the criminal courts. He provides an informed and useful discussion of practical problems likely to arise under the new criminal procedures His devotion to old style committal proceedings is well known, and indeed unmistakable in his text. He thinks that it is essential

to cross-examine important prosecution witnesses (which is the only opportunity for a solicitor to speak as an advocate in a case to be tried on indictment). The prosecution may find the old style proceedings useful in order "to get their tackle in order" for the trial. It may well be that for the first months the new committal on the papers procedure will only be used in the straightforward, uncomplicated cases in which a plea of guilty is certain. Two important points are raised on the written statements to be supplied to the defence under the new style committal procedure: first, the defence will need to have them in good time before the proceedings if they are to be willing to consent to formal committal, and secondly, if the prosecution in fact "edit" the original statements taken from the witness by the police, which many prosecution solicitors have said they are going to do, the intention of the legislation may be defeated. "It is questionable," says Napley, "whether a statement by A is truly his statement if points are deleted or altered." Even if signed by the witness? However, in principle the original statement should certainly be made available to the defence, subject to the court's power to order withholding of the whole or any point for exceptionally good cause shown—but this principle will have to be embodied in the next Act, whenever that will be.

Napley repeats his views that the ban on publication of a report of committal proceedings represents the loss of "the battle to preserve the freedom of the Press" and that "where secrecy begins justice ends" (the proceedings must be held in open court). He says that rumour will be rife and that the (responsible) Press will turn their attentions to police investigations before the charge is made (in order to avoid contempt). After mentioning Bodkin Adams, the Moors murder and Stephen Ward, he says: "The reporting of the factual evidence on which the prosecution solely relies generally, in contested cases, tends to put the matter into better perspective" [*sic*!]. One can only hope that his clients will reject his advice to waive the Press restrictions.

In principle it is right that an alibi should be disclosed. But it is very properly pointed out that the requirement to disclose within seven days of committal is most stringent, and will produce great hardship unless legal aid is regularly granted at an earlier stage than the conclusion of committal. The undertaking that by mere administrative direction the police will normally give the defence solicitor the opportunity to be present when an alibi witness is interviewed "leaves a great deal to be desired."

Little comment is offered on sentencing. The new extended sentence is rightly castigated as "another chapter in a saga of despair reflecting a continued inability to find a satisfactory solution to the problems of punishment," though no alternative proposal is advanced. On the suspended sentence, which is apparently favoured in principle, there is no such diffidence: "Whatever the experts may say, common sense appears to indicate (and there is little more to go upon) that a short sharp subjection to an unpleasant situation, coupled with the knowledge that if the offender offends again he will return to it, is far more likely to deter him from committing crime than many other forms of treatment." Readers will judge for themselves the weight to be attached to such a statement.

Alec Samuels.

The Treaty-Making Power in the Commonwealth of Australia. By Günther Doeker. [The Hague: Martinus Nijhoff. 1966. xxvii and 256 and (appendices, bibliography and index) 28 pp. Guilders 85.]

Australia has had her own Treaty List since 1935 (not 1948, as stated by Dr. Doeker, which is the year of the commencement of the Australian Treaty Series) and, despite traditional links with Britain, her international relations

have to an extent followed a separate path. Thus a study of the treaty practice of Australia is potentially of considerable interest. It is disappointing to have to report that this book does not realise that potential.

As the title suggests, this work is not concerned exclusively with the treaty-making process in Australia but with the treaty-making power. The author's treatment of his subject falls into three main parts: historical; empirical; and constitutional. The first third of the book is historical and describes the evolution of treaty-making power in the countries of the British Commonwealth in general and in Australia in particular. This amounts to an account of the development of Australia's international personality which is a familiar story already recounted fully elsewhere. Dr. Docker's account of it is accurate but adds nothing new.

Secondly, the author tackles his subject empirically and deals with the actual exercise of treaty-making power in Australia. General rules of international law are summarised and Australian practice is used as a means of illustrating or commenting upon those general rules. Dr. Docker is, however, compelled on occasion to record, as he does on page 120, that "there is, under Australian diplomatic practice, no record of incidents and cases helping to interpret this rule under international law." There one would have thought the matter should rest; the citation of cases arising under other constitutional systems completely alien to that of Australia is altogether inappropriate (pp. 120–122). The fact of the matter is that little evidence is disclosed to show that Australian treaty practice differs from, or has in any significant way influenced, general practice.

In the last part of this book the author sets out to explore the sometimes uncertain yet always fascinating frontier between international law and municipal law. Three main topics are treated: the relationship between Australian law and international law; the external affairs clause of the Australian Constitution (s. 51 (xxix)); and the competence of the states of the Australian Commonwealth in external affairs. In the first of these, several pages are devoted to an account of the monistic and dualistic theories. There is also a brief, allusive reference to a third theory of which the unspecified fundamental and theoretical basis for unspecified reasons is stated to be unsatisfactory (p. 162). Since this book is concerned with Australia it is also regrettable that no reference is made to Professor O'Connell's theory of harmonisation.

Dr. Docker's theme is that general state practice, including that of Australia, supports the dualistic doctrine of the transformation of international law into municipal law. He relies heavily on the judgment of the High Court of Australia in *Polites* v. *The Commonwealth* (1945) from which is extrapolated the doctrine that no rule of international law, whether customary or in a treaty, can be applied by an Australian court unless it has first been transformed into Australian law. But with respect, and despite certain passages in the judgments of Latham C.J. and Dixon J. in *Chow Hung Ching* v. *R.* (1949), it is clear that Australian courts, both federal and state, have regarded international customary law, subject to precedent and statute, as directly applicable by them without any act of transformation by an enabling statute. Had there been no National-Aliens Service Regulations in force in Australia during the Second World War, is there any doubt that the High Court in *Polites* would have regarded itself bound by customary international law?

The discussion of the external affairs clause of the Australian Constitution tends to revolve around the decision in *Ex p. Henry* (1936). But interesting as this is, the author's discussion is incomplete since no reference is made to the important decisions of the Australian High Court in the *Airlines of New South Wales Pty. Ltd.* v. *New South Wales* cases (118 C.L.R.) which throw light on the meaning of the external affairs clause. These decisions were given in February 1964 and February 1965 respectively. Dr. Docker's Preface is dated August 1964 and the book itself was not published until October 1966,

which would appear to have given ample time for rewriting to include a discussion of these cases.

Finally, the chapter on the competence of the states in external affairs contains some interesting information on the part played by the states in Australian treaty practice and on other activities of a quasi-external nature.

Apart from obvious omissions and some questionable opinions the root cause of this book's weakness is that the author has attempted to write a full-scale work on a subject which has not yet reached the proportions which would justify such treatment. Dr. Doeker would have been better served had he eschewed well-trodden paths and attempted to deal with his subject in some shorter form. While this would have been less ambitious, it would also, in the reviewer's opinion, have been more successful.

J. W. Bridge.

Law in the Study of Business. By Derek Roebuck, M.A., M.Com., Faculty of Commerce and Administration, Victoria University of Wellington, New Zealand. [London: Pergamon Press. 1967. vii and 148 pp. 25s.]

To examine the pedagogic use of law in the context of business, as the author of this book sets out to do, inevitably means the examination of the principles of law-teaching.

This is an inquiry into the usefulness, proper function and best form of law courses in the training of business men. As such it is both erudite and wide-ranging. Mr. Roebuck takes us through several reports and surveys on the subject, mainly from the United States, and comes to the perhaps not unexpected conclusion that "the traditional course" is unsatisfactory and should be discarded in favour of a new one. This new course occupies the second half of the book.

Most law teachers have to face these problems. At some stage in their careers they have to take a turn at what is often, perhaps unfortunately, described as "service" teaching. Faced by the prospect of an audience of embryo accountants, engineers or surveyors, or possibly just plain non-specific business men, the professional lawyer-teacher has qualms. Of one thing he is certain—that this audience differs from the one he is used to. Occasionally he will attempt to re-think his course, if this is politically possible, so as to produce something tailored to the requirements of his new consumers. For he is convinced of the validity of the service course principle and honestly desires to serve his customer well. The main difficulty here is that no one seems to know what future business men do require from the law—least of all the students themselves or their other teachers. "Enough law to show them when to call their lawyer" or, perhaps better, "to show them when not to call their lawyer" are remarks that fit more happily into an after-dinner speech than into a syllabus. Perhaps business men, like the rest of the community, do not "require" law at all, but rather suffer it.

The practical result of this approach is what Mr. Roebuck calls the traditional course. This, if one excludes the obligatory legal system course, is essentially a long-drawn-out contracts course, with heavy emphasis on detailed rules. Public law and any form of legal philosophy are both conspicuously absent. All such a course reflects clearly is law teachers' prejudices about business men. Business men are classed as practical and unacademic, whose sole interest in the law is its efficiency as a tool. We therefore teach them a great many bits of law and fail abysmally to integrate these bits either with the other bits of law or anything else they are taught or will discover. The service teaching principle dominates: we treat them as temporary half-lawyers and teach them half-law. The result, one suspects, is not a trained business man but an unemployable schizophrenic.

These defects are well delineated by Mr. Roebuck. His positive aim is

integration of courses and staff and a recognition that it is as permissible for lawyers to ask the question "What can law give to business men?" as it is for them to seek to discover the requirements of business men in learning law. The result, in terms of the substantive course, is a "functional" approach which treats the uses, the concepts and the practical applications in that order. "Legal system" is inflated into a full-scale analysis of the nature of law and, run in conjunction with an analogous politics course, takes up the whole of the first year. Public law is represented and in the second year the students have a choice of either the law of business organisations or administrative law. The approach throughout emphasises the role of the law as one instrument of social control, while at the same time the traditional business man's law areas are treated broadly (instead of courses on hire-purchase, banking and cheques, etc., there is a course on the law of credit and finance which would appear to give a much more realistic picture of this particular corner of the business world).

The reader is struck by the coherence of the final structure: not only is it a good law course for business men, it is a good law course. In a provincial law school where one "trains" as many executives for the construction industry as for the Bar (and certainly more housewives) one is tempted to wonder whether there are any special problems of teaching law to business men which we do not have when we teach law to lawyers. Certainly, today, the answers seem very similar.

R. P. GRIMM.

THE COMMON MARKET AND THE COMMON LAW. By JOHN TEMPLE LANG. [Chicago and London: The University of Chicago Press. 1966. xxxvii and 578 pp. $12.50 net.]

THIS is an examination of some legal aspects of that essentially economic problem, the integration of a new country into the EEC. The approach is detailed and the book is not only an interesting academic inquiry into the clash of the continental legal notions of the Common Market with those of a common law country, but is intended as a practical guide for lawyers who will have to deal with such problems. The author is an Irish lawyer and the prototype country is Ireland but, perhaps because the work was written for an American market, no assumptions are made about the reader's knowledge of the Irish law and points are made in a general way wherever possible. Thus the English reader will find not only a stimulating comparative study but a useful handbook to Irish and Community laws on a variety of commercial topics.

R. P. GRIMM.

LAW AND THE SOCIAL ORDER. By MORRIS R. COHEN. [Hamden, Connecticut: Archon Books. 1967. xii and 408 pp. (including index). $11. net.]

THIS is a welcome reprint of Morris Cohen's collection of essays first published as a book in 1933, and thus many of them somewhat older still. The contemporary reader must make the appropriate allowances, both in matters of factual detail, such as that "the war" always means the 1914–1918 war; and for the development of philosophical thought, which renders out of date much of the dispute as to the "scientific" character of law. But most of the contributions can still be read with profit; thus the short essay "Rule versus Discretion" which first appeared as long ago as 1914 might be made compulsory reading for all concerned with the reform of the law. The last section of the book which is entitled "Legal Philosophy in America" deals briefly

with Pound, Gray, Frank and Holmes. It is a tribute to Cohen's cool judgment and detachment that his assessment of his contemporaries squares so well with those that we can now make with the benefit of hindsight. No one interested in American legal realism can afford to ignore these pieces written at the time by one of the movement's most articulate critics.

COLIN TAPPER.

THE FOUNDATIONS OF POLITICAL THEORY. Second edition. By H. R. G. GREAVES. [London: G. Bell & Sons Ltd. 1966. vi and 208 pp. (including index). 16s. net paperback.]

THE second edition of this well-known students' textbook is unchanged apart from the addition of a brief introduction. The first edition appeared in 1958. For the students of Jurisprudence, to whom among law students this book is most relevant, it is unfortunate that it antedated Professor Hart's *Concept of Law* by some three years, since both are concerned with some of the same problems. Yet even if Professor Greaves' book had come later there is no guarantee that he would have joined issue with Hart, since he seems exceptionally oblivious of jurisprudential work on the problems he discusses. Thus although the book contains a chapter entitled "Obligation and Command," John Austin is never mentioned. Similarly Hare's distinction between the expression of desire and command is refuted, but Hagerstrom's much fuller argument to the same effect is ignored. There can be no doubt that every student will be better off for having read this book, but he will fail no examination in law if he has not.

COLIN TAPPER.

Books and Publications Received:

WILLS AND EXECUTORS. By EDWARD F. GEORGE. [London: Methuen & Co. Ltd. 1967. 194 pp. 27s. 6d. net.]

A PROBATE HANDBOOK. By D. R. HOLLOWAY. Second Edition. [London: Solicitors' Law Stationery Society Ltd. 1967. 281 pp. inc. index. £2 5s. net.]

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CRIMINAL LAW AND JUSTICE ACTS 1967. By E. ROYDHOUSE. [London: Butterworths. 1968. 446 pp. inc. index. 60s.]

MULLA ON THE CODE OF CIVIL PROCEDURE (INDIA). 13th Edition By T. L. VENKATARAMA AIJAR. Vol. 2. [Bombay: Tripathi. London: Sweet & Maxwell Ltd. 1967. 2267 pp. £8.]

HOW TO REDUCE YOUR TAX BILL. By MARGOT NAYLOR. [London: George Allen & Unwin Ltd. 1968. 189 pp. inc. index. 30s.]

PENSION SCHEMES AND RETIREMENT BENEFITS. Third Edition. By GORDON A. HOSKING. [London: Sweet & Maxwell. 1968. 412 pp. inc. index. £4 10s.]

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FOREIGN LAW ABBREVIATIONS: FRENCH. By ADOLPH SPRUDZS. [New York: Oceana Publications Inc. 1968. 108 pp. $7 50.]

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STATE ABSOLUTISM AND THE RULE OF LAW. THE STRUGGLE FOR THE CODIFICATION OF CIVIL LAW IN AUSTRIA 1753–1811. [Sydney: University Press. London: Methuen & Co. Ltd. 1968. 267 pp. inc. index. 56s.]

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MAURITIUS: CONSTITUTIONALISM IN A PLURAL SOCIETY

> "A daintie island of good refreshing . . . there is not under the sunne a more pleasant, healthy and fruitful piece of ground for an island uninhabited." (PEYRA MUNDY, navigator, c. 1638.)

MAURITIUS, *l'Ile de France*, was ceded to the Crown in 1814. It became an independent member of the Commonwealth on March 12, 1968, and was elected to membership of the United Nations by acclamation on April 24. Between 1957 and 1966 eleven Commonwealth countries in Africa, peopled by less sophisticated inhabitants, had preceded Mauritius along the same road. Why did Mauritius lag behind? Only by outlining some of the special problems affecting Mauritius can this question be answered. Such an outline, albeit inadequate to portray a complex scene, will also help to explain the peculiar features of the independence constitution.

I. BACKGROUND [1]

Mauritius is small, remote and overpopulated. Its economy is seriously vulnerable to fluctuations in world commodity prices. Intricate communal problems have stunted the growth of national consciousness and have too often dominated political controversy in modern times. In many developing countries some of these difficulties are present in a more acute form; but the Mauritian blend is unique.

Geography has been unkind to Mauritius. The island lies far out in the Indian Ocean, more than 500 miles to the east of Madagascar. Together with Rodrigues, a smaller island another 360 miles to the

[1] There is no standard work on Mauritius, and next to nothing has been published on the fascinating political contortions of the last few years; the writer is obliged to resist any temptation to fill this gap. General historical accounts can be found in P. J. Barnwell and A. Toussaint, *A Short History of Mauritius* (1949) and Auguste Toussaint, *History of the Indian Ocean* (1966). Detailed factual information is collected in the *Annual Reports* (H.M.S.O.); the latest is for 1966. Burton Benedict, *Mauritius: Problems of a Plural Society* (1965) is a good short survey of the main contemporary issues.

east,[2] it has an area of 760 square miles [3]; the islands are frequently smitten by cyclones.

Unfortunately, the population is now more than 800,000, an extraordinary figure for a tiny agricultural country, and despite a recent decline in the birth-rate it may well exceed two millions by the end of the century.[4] The soil is fertile, but no mineral resources have yet been discovered, and the economy is overwhelmingly dependent on sugar, which accounts for 97 per cent. of the country's exports. The sugar industry in Mauritius is highly efficient. But the present world market price of sugar does not even cover the cost of production. The standard of living, still significantly higher than in the large majority of African and Asian countries, has been maintained by virtue of the Commonwealth Sugar Agreement, under which two-thirds of the sugar crop is sold, largely to the United Kingdom, at a high price.[5] Unemployment and underemployment are rife; some progress has been made towards diversification of the economy by the development of light industry, tourism and tea production, but there are too few jobs to provide for the growing body of school-leavers.[6] Foreign investment and international aid are sorely needed; they are also sorely needed by a great number of competitors. Emigration is acting as a palliative to the problem of over-population; but the Mauritians who leave tend to be those with specialised skills whom the country can ill afford to lose. Shortly before independence Mauritius received from the United Kingdom a substantial grant of budgetary aid; this was the first occasion on which Mauritius had received direct aid for such a purpose.

Communal problems in Mauritius, though undoubtedly serious, are not necessarily desperate. Mauritius has no long history of bloody inter-communal disorders—the rioting between Muslims and Creoles early in 1968, resulting in twenty-seven deaths, was unprecedented—or residential segregation; nor is there an indigenous population outnumbered by immigrants of a different race or culture. The only important indigenous inhabitant was the dodo. The Dutch, fitful

[2] Rodrigues, little known to the outside world and difficult to reach (see Quentin Keynes, "Island of the Dodo" (1956) 100 *National Geographic Magazine* 77, 93, 99, 102–104), produces livestock and vegetables. Till independence it was administered as a dependency of Mauritius. For Rodriguan separatism, see pp. 612, 618, 622, *post*.

[3] Mauritius (with Rodrigues) also has two remote island dependencies, Agalega and Cargados Carajos. A former dependency, the Chagos Archipelago, was detached in 1965; see p. 609, *post*. See generally, Sir Robert Scott, *Limuria: the Lesser Dependencies of Mauritius* (1964); F. D. Ommaney, *The Shoals of Capricorn* (1952).

[4] *Cf.* Richard Titmuss and Brian Abel-Smith, *Social Policies and Population Growth in Mauritius* (1961), Chap. 3. The guess made in the text above is perhaps a conservative estimate.

[5] £47 10s. a ton in 1968, well over three times the world market price at the time of independence.

[6] For a comprehensive analysis of the basic problems, see J. E. Meade, *The Economic and Social Structure of Mauritius* (1961).

colonists, gave Mauritius its name; before they left in 1710 the dodo was dead. They were succeeded by the French, who established themselves in strength; they planted sugar, introduced French culture and African slaves, and begat many children of mixed blood. Although French rule was brought to an end during the Napoleonic Wars, the impact of France, and of the Franco-Mauritian settlers who still control the sugar industry, remains profound in Mauritius today. For example, among nearly all elements in the population French is spoken more fluently than English, and English is spoken with a French accent.[7] But British political institutions and ideas have prevailed—Franco-Mauritian political and social attitudes have tended to remain pre-revolutionary—and even French civil law has yielded some ground to English innovations.

In 1885 the slaves were emancipated. About this time, the first Indian indentured labourers were brought in to work on the sugar estates. Most of the labourers were prevailed upon or chose to make their homes in Mauritius, and by 1861 two-thirds of the population were of Indian origin.[8] Indian immigration had almost ceased by the end of the nineteenth century, and Indo-Mauritians can rightly claim to be as fully Mauritian as the "General Population"—the French and Creole[9] sections of the population.

At the 1962 Census, the population was broken down into four main groups. Approximately half the population described themselves as belonging to the Hindu section of the population, one-sixth as Muslims, 30 per cent. as members of the "General Population" and 3 per cent. as Chinese. The General Population is overwhelmingly Roman Catholic and varies in colour from white to black with numerous intermediate gradations of brown. Many Chinese are also Roman Catholics. The principal communal divisions in Mauritius are religious or cultural; they are not primarily ethnic, and today they have little to do with colour.

II. Constitutional and Political Development Till 1967

Till 1948 public affairs in Mauritius were dominated by British officials and Franco-Mauritian settlers. A few coloured men—Ollier, Newton, the Laurents, Rivet, and later Anquetil and Rozemont—

[7] The official language of the Legislative Assembly is still English (Independence Constitution, s. 49), though members may address the chair in French. For political reasons the Opposition has urged the adoption of French as a second official language; the Government has resisted this demand on the ground that it would lead to further demands for the instatement of Hindi, Urdu and other languages, with a consequential growth of linguistic communalism.

The nearest approach to a *lingua franca* in Mauritius is Creole, basically a French *patois*; the language has hardly any literature.

[8] See generally Burton Benedict, *Indians in a Plural Society* (1961).

[9] Originally the word "Creole" meant a French settler. Nowadays it usually denotes a non-white Mauritian who is not exclusively of Indian or Chinese origin, though sometimes persons of mixed race are called "coloured" and black Mauritians "Creoles." The term "Creole" also refers to a language (note 7, *supra*).

were to make their mark in politics,[10] but the shaping of local policy was essentially oligarchical. During the stormy Governorship of Sir John Pope-Hennessy, a dynamic Irish Catholic home ruler whose unorthodox concept of "Mauritius for the Mauritians" embraced a solicitude for the rights of Creoles and even Indo-Mauritians,[11] the Constitution of 1885 was adopted.[12] There was created a new Council of Government, consisting of the Governor, eight *ex-officio* members, nine nominated members (of whom at least three were to be non-officials), and ten other members elected on a narrow franchise. The Governor retained wide executive powers exercisable in his personal discretion. Nevertheless, the constitution was a liberal one for a Crown colony.

For more than sixty years Mauritius was governed under the 1885 Constitution; the only significant amendment was made in 1933, when the proportion of nominated non-officials was increased from one-third to two-thirds. But immediately after the Second World War came a major reform. Under the Constitution of 1947 the unofficial majority in the Legislature became an elected majority; and the franchise was broadened so that the electorate increased sixfold.[13] The consequences were dramatic. For the first time the Indo-Mauritians emerged as a real political force; eleven out of the nineteen elected seats were won by Hindus, seven by Creoles and one by a Franco-Mauritian. The results produced alarm and despondency not only among Franco-Mauritians but also among many Creoles who, having been effectively excluded for so long from the political influence to which their numbers had entitled them, now found themselves outnumbered by Hindu voters. The radical Mauritius Labour Party had been founded by Creoles; now it had become a predominantly Hindu party, and there began that alienation of Creoles from Hindus which has been the most regrettable feature of modern Mauritian politics.

But it was still a far cry from representative government to responsible government. Of the elected members of the Legislative Council, none was directly appointed to the Executive Council, though four of them were indirectly elected to membership of the Executive Council by proportional representation. Of the eleven nominated non-official members of the Legislative Council—there were also three *ex-officio* members as well as the Governor—seven were white and none was a Hindu.[14] At this time the Labour Party held a clear majority of the nineteen elective seats and had been

[10] See Jay Narain Roy, *Mauritius in Transition* (1960), Chap. 8.

[11] James Pope-Hennessy, *Verandah* (1964), pp. 231–302.

[12] D. Napal, *Les Constitutions de l'Ile Maurice* (1962), p. 93. It is understood that a more detailed factual account of some of the constitutional developments set out in this section will appear in Chapter 3 of the *Annual Report for 1967*.

[13] See S.R. & O. and S.I. Revised 1948, xiii, pp. 271, 277. For the *travaux préparatoires*, see Cmd. 7228 (1947).

[14] Roy, *op.cit.*, pp. 365–366.

allocated none of the nominated seats.[15] Possibly the Governor was alive to the "Hindu menace." However, "Liaison Officers," without executive responsibilities, were appointed in 1951, and there were elected members among them.

Clearly such a situation could not endure. There followed the first round of those excruciatingly protracted but highly sophisticated controversies over constitutional reform in which Mauritius has excelled. (The local predilection for devious manoeuvre, political defamation and general disputation has earned the stern censure of some [16] and provided innocent entertainment for others.) In December 1958 the Legislative Council, by a small majority, passed a resolution calling for a greater measure of self-government. The Secretary of State for the Colonies temporised, asking the Governor to hold local consultations. An array of multifarious schemes soon proliferated. The Labour Party called for universal suffrage, a reduction in the number of nominated members and the introduction of a ministerial system. Others put forward proposals including communal representation with separate electoral rolls, multi-member constituencies with a limited vote, and an increase in the number of nominated members. Eventually the Secretary of State accepted the principles of universal suffrage and an unofficial majority in the Executive Council with a ministerial system, but proposed that the elected members of the Legislative Council and the non-official members of the Executive Council should all be elected by the single transferable vote system of proportional representation.[17]

The Mauritius Labour Party would have nothing to do with the proportional representation scheme, and a further series of meetings was convened in London. The outcome was the London Agreement of 1957.[18] Under this Agreement, a ministerial system of government was introduced. An independent Boundary Commission would be appointed to see whether Mauritius could be divided into forty single-member constituencies, which would give "each main section of the population . . . adequate opportunity to secure representation corresponding to its own number in the community as a whole." Failing this, elections would be held according to the party list system of proportional representation. In addition, the Governor

[15] H. V. Wiseman, *The Cabinet and the Commonwealth* (1958), pp. 63–64, 181–182.

[16] *Cf.* Sir Robert Scott, a former Governor: "... the most daunting obstacle in the way of healthy political development in Mauritius is the manner in which the political and social structure is pervaded through and through by fear and suspicions, jealousies and dislikes. Combined with this is that flavour of final purposeless, inner irresponsibility which Lord Keynes attributed to a distinguished statesman now dead" (Despatch No. 11 of January 7, 1955, para. 11 (Mauritius Legislative Council, Sess.Pap. No. 8 of 1956)). This judgment may have been too severe.

[17] Despatches of February 10, 1956, and March 10, 1956 (published in Sess.Pap. No. 8 of 1956).

[18] H.C.Deb., Vol. 566, cols. *115–117* (Written Answers); Mauritius Legislative Council, Sess.Pap. No. 1 of 1958, Appendix C.

would be enabled to nominate, in his personal discretion after consultation with members of the Legislative Council, up to twelve other members. Nomination was not to be used to frustrate the results of the elections—the 1948 precedent was not to be followed—but would be used "to ensure representation of special interests or those who had no chance of obtaining representation through election." The proposal for the election of members of the Executive Council by proportional representation was dropped; instead, the Governor was to invite nine members of all elements in the Legislative Council, to be represented as nearly as possible in relation to party strengths.

The Trustram Eve Boundary Commission succeeded in devising forty single-member constituencies [19] by what may be described as "honest gerrymandering" [20]; its proposals were accepted [21] and implemented. At the General Election of 1959, held under a new constitution [22] and on the basis of universal suffrage, the Labour Party won a large majority of seats, campaigning in harness with its new ally, the overtly communal Muslim Committee of Action; the Independent Forward Bloc, then a Hindu party of the *sans-culottes*, made headway; the Parti Mauricien, a conservative party representing Franco-Mauritians and middle-class Creoles, fared poorly. Under-represented minorities were allocated nominated seats. The new Government, formed in accordance with the principles laid down in the London Agreement, was a coalition, and not a majority party Government.[23]

A somewhat uneasy equilibrium was thus established, and the way ahead was obscure. The United Kingdom Government was anxious not to exacerbate communal tensions or to imperil a vulnerable economy by forcing the pace towards full internal self-government. At a Constitutional Review Conference held in 1961 the only significant change proposed was the creation of the office of Chief Minister; further changes, still falling short of internal self-government, would be deferred till after the next General Election; after that, Mauritius might move forward to full internal self-government, "if all goes well and it seems generally desirable." A visit by the Constitutional Commissioner might be arranged in due course.[24]

At the General Election of 1968 the Mauritius Labour Party lost

[19] Sess.Pap. No. 1 of 1958.
[20] *Cf.* W. J. M. Mackenzie, *Free Elections* (1958), pp. 110–112; T. E. Smith, *Elections in Developing Countries* (1960), pp. 13–14, 148.
[21] Sess.Pap. No. 5 of 1958.
[22] S.I. 1958, p. 2914. The constitutions of Mauritius up to independence were made by prerogative instruments. See further, on the 1958 Constitution, S.I. 1959, pp. 3501, 3505, 3506, 3510.
[23] Two Independents were appointed. The Independent Forward Bloc refused the Governor's invitation to join the Government.
[24] Sess.Pap. No. 5 of 1961; reproduced in the Report of the Mauritius Constitutional Conference 1965 (Cmnd. 2797 (1965), at pp. 12–15). See also S.I. 1961, pp. 4631, 4632; S.I. 1962, p. 4068.

its absolute majority, winning nineteen out of the forty elected seats; the Parti Mauricien, having attracted a larger body of Creole support in the urban belt, improved to eight seats; the Independent Forward Bloc won seven, the Muslim Committee of Action four, and Independents two. The nomination of the twelve additional members proved burdensome both to the Governor and to some of the party leaders; the outcome left the balance of political forces much as it had been, but gave the General Population a slightly stronger representation than before. A complicating factor in the process of nomination had been the assurance previously given to the leaders of the Muslim Committee of Action that prior consideration would be given to Muslim "best losers"—candidates who had been narrowly defeated at the General Election. Apart from the embarrassing problems created between and within the parties over the selection of candidates for nomination, there were differences in interpretation over the meaning of a Muslim "best loser."[25] But the idea that best losers had special claims to membership—an idea that would be unacceptable in most countries—was to take root in Mauritius.

I visited Mauritius in July and August 1964. By this time the modest "second stage" of the 1961 conference decisions had been introduced[26] and an all-party coalition had been formed; there were no fewer than fourteen non-official Ministers, and the Chief Minister, Dr. (now Sir Seewoosagur) Ramgoolam had been elevated to the rank of Premier, but the Governor still presided in the Executive Council.

My main purpose was to explore the foundations of a constitutional scheme appropriate for full internal self-government, and in particular to reconsider the system of electoral representation and to examine new safeguards for minorities. It was clear that the existing rules and practices relating to the nomination of members would have to be discontinued. There was no consensus on what should replace it. My own suggestions stimulated discussion but offered no final answer. I reviewed a number of other possible constitutional safeguards for group and individual interests—a constitutional Bill of Rights had already been introduced—and came down in favour of an Ombudsman with wide terms of reference.[27]

The decisive Constitutional Conference on Mauritius took place in London in September 1965. Although the island had yet to achieve full internal self-government, the central issues facing the conference were the determination of ultimate status and the constitutional framework to be adopted for self-government and the next

[25] See Sess.Pap. No. 2 of 1965, paras. 14, 15.

[26] Mauritius (Constitution) Order 1964 (S.I. 1964, p. 1163). For the new Royal Instructions see S.I. 1964, p. 1906.

[27] Report of the Constitutional Commissioner, November 1964 (Sess.Pap. No. 2 of 1965).

and final step forward. The Mauritius Labour Party and the Independent Forward Bloc advocated independence. The Muslim Committee of Action was not opposed in principle to independence but strongly urged the introduction of better constitutional safeguards for Muslim interests. The Parti Mauricien Social Démocrate—the party had acquired a less conservative image as a result of the efforts of Gaëtan Duval, a young coloured lawyer who was the most stirring public speaker in Mauritius—opposed independence and supported the principle of free association with the United Kingdom[28]; it demanded a referendum on the question of independence or association. In the event, Mr. Anthony Greenwood, the Secretary of State, announced on the last day of the conference his view that it was right that Mauritius should be independent. If a referendum on independence were to be held, this would prolong uncertainty and "harden and deepen communal divisions and rivalries." Instead, a General Election would be held under a new electoral system which would be introduced after an independent Electoral Commission had reported. If the newly elected Legislative Assembly then so resolved, Her Majesty's Government would, in consultation with the Government of Mauritius, fix a date for independence after six months of internal self-government.[29] By the time the Secretary of State's announcement was made, the members of the Parti Mauricien delegation had walked out of the conference. After the announcement they were joined by the two Independents.

At the conference a constitutional framework for self-government and independence had been devised.[30] One important element was missing—the system for elections and legislative representation. In view of the disagreements about ultimate status and the manner of self-determination, it was felt to be particularly important to reach agreement between the parties on this crucial matter, especially as the Parti Mauricien was known to be heavily supported by the General Population and was thought to be making headway among other communities. But although many ingenious compromise solutions were canvassed, none was generally acceptable. The Secretary of State therefore decided that, instead of imposing a solution, he should appoint a Commission to make recommendations on an electoral system, constituency boundaries and the best method of allocating seats in the Legislature. There were to be no more nominated members, and provision should be made for the representation of Rodrigues. For the rest, the electoral system was to be based primarily on multi-member constituencies—the small size of the existing constituencies had led to parochial pressures being exerted on members—and there were to be no communal electoral

[28] The party was (and is) markedly Francophile and has tendencies towards Anglophobia. Its enemies claimed that its true preference was for union with France. The neighbouring island of Réunion is an overseas department of France.

[29] Cmnd. 2797 (1967) p. 7.

[30] *Ibid.* at pp. 22–30. See further, pp. 614–621, *post*.

rolls; the system "should give the main sections of the population an opportunity of securing *fair* representation of their interests, if necessary by the reservation of seats,"[31] but no encouragement should be given to the multiplication of small parties.

Shortly after the conference the Chagos Archipelago was detached from Mauritius, and together with some islands in the Seychelles group was constituted as a new colony, the British Indian Ocean Territory.[32] It was contemplated that this territory might be used for strategic purposes. The Government of Mauritius received £8 million by way of compensation. The Ministers belonging to the Parti Mauricien then went into opposition, ostensibly on the ground that the compensation was inadequate.

The Banwell Commission, which reported early in 1966,[33] showed that the resources of human ingenuity had not yet been exhausted. The basic structure of the Commission's proposals was simple enough: twenty constituencies in Mauritius formed by amalgamating the existing constituencies in pairs, each returning three members, with block voting under the first-past-the-post system; and two members with full voting rights for Rodrigues. There were to be no communally reserved seats. In order to safeguard under-represented minorities, two "correctives" were proposed. In the first place, if a party obtained more than 25 per cent. of the votes cast but less than 25 per cent. of the seats, additional seats should be allocated to that party's "best losers" to bring its representation just above the 25 per cent. level; this device was conceived mainly for the purpose of giving the Opposition a "blocking quarter" in the process of constitutional amendment under a new constitution. In the second place, there would in any case be five extra seats to be allocated to "best losers" from under-represented parties and communities by means of a complex formula introducing an element of proportional representation; no party would be entitled to such a seat unless it had obtained at least 10 per cent. of the total vote and at least one directly elected member and unless it had a defeated candidate belonging to the community entitled to the seat to be allocated.

The United Kingdom Government, having accepted these proposals, executed an abrupt side-step when the parties represented in the Government of Mauritius flatly rejected the principles underlying the correctives. The Banwell recommendations would have left the Muslim Committee of Action with a choice between the fate of the dodo and the embraces of the Mauritius Labour Party. To its

[31] Cmnd. 2797 (1967), p. 5 (italics provided). These words were carefully chosen, and were intended to indicate that the Commission was not obliged to attempt to ensure that all sections of the population should be afforded representation in proportion to their numbers. To this extent the London Agreement of 1957 was superseded.

[32] S.I. 1965 No. 1920. See also S.I. 1965, p. 6440; H.C.Deb. Vol. 720, col. 2 (Written Answers) (November 10, 1965).

[33] Colonial No. 362 (1966).

leaders neither alternative seemed attractive. The Labour Party was also in a difficult position. As the major partner in the Government coalition, it felt itself to be losing popular support as a result of the deteriorating financial and employment situation. Partly because of the conflicts between India and Pakistan, many Muslims had gravitated to the Parti Mauricien. The Labour Party needed all the Muslim support it could retain. At the same time, it was threatened by the emergence of a new political body, the narrowly sectarian Hindu Congress, which was a by-product of the anti-Hindu campaign waged by some elements in the Opposition. And it had a deep suspicion of the divisive potential inherent in any scheme of proportional representation. In short, it could see itself falling at the last hurdle before independence.

Mr. John Stonehouse, the Parliamentary Under-Secretary for the Colonies, was dispatched to Mauritius, and within a few days brought off the remarkable feat of securing the agreement of all parties on a modified version of the Banwell scheme. Briefly, the Banwell "correctives" were dropped; instead, there were to be eight seats allocated to best losers from under-represented *communities*, but the allocation was to be made in such a way as to retain the numerical balance between the party or party alliance having the largest number of victories in the sixty-two constituency seats on the one hand, and the minority party or party alliance on the other; the requirement that a party had to obtain 10 per cent. of the total vote and one directly elected member to qualify for a best loser seat was also eliminated.[34] Thus was Mauritius to move forward into the society of nations.

All that remained was to draw up new electoral registers, dissolve the Legislative Assembly and conduct the fateful General Election. The pace of events, however, was far from lively.[35] Ultimately the elections were held on August 7, 1967.[36] About 90 per cent. of the registered electors voted. The Mauritius Labour Party, the Muslim Committee of Action and the Independent Forward Bloc, which had formed an *ad hoc* Independence Party, obtained 54·5 per cent. of the votes and won thirty-nine seats, nearly all in mainly rural constituencies. The Parti Mauricien Social Démocrate, under Duval's skilful leadership, obtained 48·5 per cent. of the votes and won twenty-three seats, all in urban constituencies or Rodrigues where

[34] See H.C.Deb. Vol. 731, cols. 92–94 (Written Answers) (July 7, 1966); and Schedule 1 to the Constitution of 1966 (S.I. 1966, p. 5190), now reproduced in Schedule 1 to the Independence Constitution (S.I. 1968, p. 1871).

[35] This was attributable partly to the cumbersome procedure for registration and partly to a disinclination on the part of the Mauritian Ministers to rush to the hustings amid gathering storms. Under the then existing constitution the Governor could have dissolved the Legislative Assembly without ministerial advice, but to do so would have been highly injudicious.

[36] Both the process of registration and the elections were scrutinised by a team of Commonwealth observers. They made criticisms on points of detail but agreed that the procedures were free and fair (Commonwealth Nos. 2 and 3 (1967)).

Hindus are in a minority. The Hindu Congress proved to be a damp squib; the intervention of its candidates had no effect on the result in any constituency. Other parties and independent candidates received negligible support.

Of the Independence Party's successful candidates, thirty-one were Hindus, five were Muslims and three were members of the General Population. Of the P.M.S.D.'s successful candidates, three were Hindus, five were Muslims, thirteen were members of the General Population and two were Sino-Mauritians; it is generally thought that the party received at least 70 per cent. of the Muslim vote, at least 80 per cent. of the General Population vote and the bulk of the Chinese vote, but little support among Hindus other than Tamils.

The eight best loser seats were then allocated, four to each party; six went to candidates belonging to the under-represented General Population, one to a Muslim and one to a Hindu. The Muslim was Mr. A. R. Mohamed, the leader of the Muslim Committee of Action. For many years Mr. Mohamed, perhaps the most colourful figure in Mauritian politics, had been the arch-priest of best-loserdom. The self-government constitution was brought into force,[37] and the new Legislative Assembly passed a resolution requesting the United Kingdom Government to implement the decisions taken in London in 1965. On October 24, 1967, it was announced that Mauritius would become independent on March 12, 1968.

III. Mauritius at the United Nations

A brief note on the treatment of the problems of Mauritius by the political organs of the United Nations may be interpolated at this point.

Mauritius was first discussed at the United Nations in 1964, and then only in a perfunctory way. The creation of the British Indian Ocean Territory in 1965 was naturally condemned[38]: it involved the dismemberment of existing colonial territories and the establishment of a new colony with a view to its use for "foreign bases." Indeed, the Committee of Twenty-Four has refused to recognise the existence of the new colony as a legitimate entity.

1967 was a bad year for Britain at the United Nations. Britain was denounced for refusing to use force to quell the Rhodesian rebellion; the grant of associated statehood to five small islands in the Caribbean was not accepted as a bona fide act of decolonisation; and the General Assembly ended by demanding in effect that

[37] For the text, see Mauritius Constitution Order 1966 (S.I. 1966, p. 5190); for the Royal Instructions, see S.I. 1967, p. 2185. Three minor amendments were made to the Constitution Order in 1967 (see S.I. 1967, pp. 2183, 3807, 5455; the third designated the Premier as Prime Minister). See also the Mauritius (Former Legislative Council) Validation Order 1966 (S.I. 1966, p. 5254); for the background to this Order, see *Annual Report for 1966*, pp. 5–6.

[38] General Assembly Resolution 2066 (xx) (1965).

Gibraltar be handed over to Spain against the will of the overwhelming majority of the colony's inhabitants. Against this background one would hardly have expected the Committee of Twenty-Four or the Fourth Committee of the General Assembly to congratulate Britain on the progress that was being made towards the decolonisation of Mauritius, particularly in view of the fact that from September 1965 till August 1967 progress was not immediately perceptible. Even so, some of the proceedings before those bodies may cause the most hardened cynic to blench. Statements of fact were treated as falsehoods and fantasies were accepted as facts.[39] But once independence had been achieved (presumably to the surprise of the majority of the Committee of Twenty-Four), all was forgotten, if not forgiven.

IV. INDEPENDENCE

The road from internal self-government to independence was short but stony. In the first place, separatist agitation developed in Rodrigues, which has an almost exclusively Creole population and had voted overwhelmingly for the P.M.S.D. and against Mauritian independence at the 1967 elections. Separatist movements in former

[39] (i) On June 15, 1967, a Mr. Sibsurrun, who claimed to have 50,000 supporters in Mauritius, launched into a vitriolic attack on the Government of Mauritius when giving evidence by special invitation as a petitioner before the Committee of Twenty-Four. He was treated with deference by the Chairman and some of the other delegates. (See A/AC. 109/S.R. 535.) At the General Election held a few weeks later, Mr. Sibsurrun obtained 63 votes in his constituency, receiving the support of 0·6 per cent. of the voters.

(ii) On June 16, 1967, the Indian representative on the Committee observed that the "United Kingdom Government's policy with regard to Mauritius was to delay independence as much as possible . . . the United Kingdom Government had found one pretext after another to postpone the inevitable, giving the impression that it had found parting with that rich colony extremely difficult." (See A/6700/Add. 8, at pp. 38–39.) For many years the Indian Government had had a resident Commissioner in Mauritius.

(iii) The Tanzanian representative remarked in April 1967: "The electoral system under which each voter would be obliged to cast three votes was one which had been tried in Tanganyika prior to its independence and had since been discarded. Such a system actually amounted to a denial of the right to vote . . ." (A/6700/Add. 8, Annex, p. 24). The representative may conceivably have had his mind on Fiji, not Mauritius. If he was indeed addressing his mind to the right country his incomprehension was total.

(iv) On November 24, 1967, the representative of the Democratic Republic of the Congo noted with regret (in the course of a debate on a report on the activities of foreign monopolies which were allegedly impeding the granting of independence in colonial territories) that the situation in Southern Africa was being repeated in Mauritius (see A/C.4/S.R. 1724 at p. 9). In fact there are no foreign (or British) monopolies operating in Mauritius; and the date for the independence of Mauritius had been announced four weeks earlier. This anthology could easily be enlarged.

One should add that the Committee of Twenty-Four had at its disposal a substantial body of factual information, prepared by the Secretariat, about Mauritius; and that the British representative made supplementary factual statements and replied to the questions and assertions of other representatives.

island dependencies of larger islands or island groups which have just achieved full self-government are becoming a common phenomenon—the Anguillan rebellion against the authority of St. Kitts and the desire of Barbuda to sever its links with Antigua are two manifestations of this trend—and they are apt to present very great difficulties. The antipathy in Rodrigues towards Mauritius was accentuated by ethnic differences. However, the United Kingdom Government refused to accede to the Rodriguan request for secession.[40]

Secondly, the rioting between Muslims and Creoles in Port Louis, the capital of Mauritius, late in January 1968 quickly led to the proclamation of a state of emergency [41] and the calling in of British troops from Singapore. The most serious disorders were soon quelled, but not before many casualties and heavy damage to property had occurred. The connection between the rioting and political rivalry was tenuous; the immediate causes appear to have been the growth of prostitution and protection rackets operated by communal gangs; but once violence had begun it spread beyond the organised hooligans and assumed an uglier dimension. Hindus were unaffected. For the P.M.S.D. the outcome was an evaporation of the party's support among the Muslim section of the population.

The United Kingdom Parliament passed the Mauritius Independence Act 1968; and the Mauritius Independence Order 1968,[42] embodying the Constitution, was made. Meanwhile a compensation scheme for expatriate public officers who chose to retire had been adopted.[43]

Princess Alexandra was to represent Her Majesty at the independence celebrations. On the advice of the United Kingdom Government—advice which was resented and criticised in Mauritius—she did not attend them. Despite the continuance of the state of emergency, the celebrations passed off with dignity and without untoward incidents; the only casualty directly attributable to the celebrations was a member of the Mauritius Police Force, injured during the course of an over-ambitious motor-cycle display. The official Opposition had instructed its supporters to boycott the celebrations; two members of the P.M.S.D. nevertheless attended the State Opening of Parliament, and one of them, loudly applauded from the Government benches, seconded the Prime Minister's address in reply to the Speech from the Throne.[44] In Rodrigues prudence prevailed,

[40] *The Times*, January 13, 1968. Union with Réunion seems to have been the preferred option of the Rodriguans. About this time Rodrigues was struck by two cyclones, and shortly afterwards there was rioting on the island over the distribution of food supplies.

[41] The Governor was still responsible for internal security, but he acted in consultation and with the concurrence of the Prime Minister.

[42] S.I. 1968, p. 1871.

[43] S.I. 1967, p. 3782. See further Cmnd. 3606 (1968) (Public Officers Agreement).

[44] Another unexpected incident was a small but vigorous Maoist demonstration at Plaisance Airport to greet the official guests from Peking.

and the official flag-raising ceremony took place unceremoniously under the cover of darkness.

V. The Constitution

At first glance the Independence Constitution may seem to be a not very remarkable product of the Westminster export model factory. Closer scrutiny reveals a number of unusual features calling for explanation.

The Legislature

Mauritius has a unicameral legislature of seventy members. The peculiarities of the best loser system under which eight of the seats are allocated after the filling of the sixty-two constituency seats have already been outlined.[45] The most regrettable aspect of the electoral system is that candidates must declare, at the time of their nomination, to what community they belong; but this was the price paid in order to obtain agreement between the parties in 1966.

Constituency delimitations are to be conducted at intervals of not more than ten years by an Electoral Boundaries Commission, composed of a chairman and two to four other members appointed on the advice of the Prime Minister after consultation with the Leader of the Opposition; the members will hold office for five years, subject to removal in the same manner as superior judges.[46] Supervision of the registration of voters and the conduct of elections is entrusted to an Electoral Supervisory Commission, the Chairman of which is to be appointed by the Judicial and Legal Service Commission, a conspicuously non-political body; the other members of the Supervisory Commission are appointed in the same manner as those of the Boundaries Commission; all enjoy the same judicial-type tenure. Bills and other legal instruments relating to registration and elections must be submitted in draft to the Supervisory Commission for comment; any report made by the Commission must be laid before the Assembly. An Electoral Commissioner, a barrister appointed by the Judicial and Legal Service Commission and enjoying judicial security of tenure, works under the exclusive authority of the Supervisory Commission.[47]

Executive and Legislature

Provision is made for the normal Cabinet system of parliamentary government. But there can be as many as fifteen Ministers and five

[45] At p. 610 *ante*. See Constitution, s. 31 (2) and Sched. 1. Resident Commonwealth citizens, as well as citizens of Mauritius, may vote and be elected to the Legislative Assembly (Constitution, ss. 38, 42). The Speaker of the Assembly is removable only on the resolution of two-thirds of the membership of the Assembly (s. 32 (3) (*d*)).

[46] ss. 38 (1), 39, 92 (2)–(5).

[47] ss. 38 (2), 40, 41, 92 (2)–(5).

parliamentary secretaries.[48] Undoubtedly Mauritius could be governed by fewer office-holders; the liberal upper limit is a manifestation of the politics of accommodation,[49] of which Sir Seewoosagur Ramgoolam is an accomplished exponent. In this plural society, governed by a potentially fissiparous coalition, it has been thought necessary to accommodate as many political and communal interests as possible within the framework of the Constitution. There are other plural societies (*e.g.*, the Lebanon) in which more elaborate and devious expedients are employed for a similar purpose.[50]

A Parliament lasts for five years unless sooner dissolved. Normally the Governor-General may dissolve Parliament only on the Prime Minister's advice. However, he may dissolve without advice if (i) the office of Prime Minister is vacant and he considers that there is no prospect of being able to find a successor with majority support in the Assembly; or (ii) the Assembly has passed a vote of no confidence in the Government and the Prime Minister has neither resigned within three days nor advised a dissolution within seven days or such longer period as the Governor-General considers reasonable.[51] If the latter situation arises and the Governor-General decides not to dissolve, he must instead remove the Prime Minister. If after a General Election the Governor-General is of the opinion that the Prime Minister has lost his majority, he *may* remove the Prime Minister, but not until ten days have elapsed, unless he is satisfied that the Opposition has won a majority of seats[52]; the requirement of ten days' grace is presumably designed to cover the type of situation that arose in Sierra Leone early in 1967, precipitating a *coup d'état*. The office of Prime Minister does not automatically become vacant on a dissolution of Parliament.

The Governor-Generalship

This recital shows that the Governor-General is invested with several personal discretionary powers which may have to be exercised in times of political crisis. In addition, he has a limited discretion in choosing a Prime Minister and has a free discretion to appoint an acting Prime Minister when the Prime Minister is incapable of tendering advice on this matter, and his concurrence is needed before any appointment to his own personal staff is made.[53]

[48] ss. 59–62, 66. Ministers other than the Attorney-General must be chosen from among members of the Assembly. Special provision is made (ss. 59 (3), 60 (3), 69) for an Attorney-General who is not a member of the Assembly; the first two Attorneys-General have, however, been existing members of the Assembly.

[49] *Cf.* Arend Lijphart, *The Politics of Accommodation: Pluralism and Democracy in the Netherlands* (1968).

[50] Leonard Binder (ed.), *Politics in Lebanon* (1966). And *cf.* the Dodo in *Alice in Wonderland* (Chap. 3): " . . . *all* must have prizes."

[51] Constitution, s. 57.

[52] s. 60.

[53] ss. 59 (3), 63, 89 (3).

This list of personal discretions differs in content from that found in other Westminster model constitutions, but it is not extraordinary in its general range; indeed, the Governor-General of Mauritius lacks the general discretionary power found in some of the recent Commonwealth constitutions to refuse a Prime Minister's request for dissolution whenever he thinks that a dissolution would be contrary to the national interest and that an alternative government can be found without a dissolution.

What is extraordinary and unique in Mauritius is the range of other personal discretions vested in the Governor-General. This feature of the Constitution is traceable to the decision taken in 1965 to remove from the hands of the political branch of the Executive the power to exercise certain highly sensitive functions which might give rise to serious political contention.

Thus, the Governor-General personally appoints and removes not only the Leader of the Opposition (s. 78) and the members of the Commission on the Prerogative of Mercy (s. 75); what is far more important is that personal responsibility for the appointment of the Chief Justice, the Ombudsman, and members of the Public Service and Police Service Commissions, is vested in the Governor-General.[54] In 1965 it was thought inexpedient to follow the normal course of leaving responsibility for these appointments in the hands of the Prime Minister, having regard to the political and communal tensions obtaining in Mauritius.

The importance of the Service Commissions in the governmental and social structure of Mauritius can hardly be overestimated. For many years Creoles had been strongly entrenched in the civil service, the police and the judiciary; their morale and even loyalty might be undermined if they felt that they were being made the victims of communal or political discrimination or personal nepotism, and allegations of impropriety (usually ill-founded) against persons wielding political authority have abounded in Mauritius. Well-paid jobs outside the public service are very scarce; jockeying for position is commonplace. Once the Service Commissions had been given executive and not merely advisory powers, and internal self-government had been introduced, new assurances were vitally necessary. It is significant that the Constitution lays down that the Public Service and Police Service Commissions shall be composed of a Chairman (who at the present time is British) and four other members; it was expected of the Governor-General that he should play his part in the politics of accommodation by appointing one member from each of the four main sections of the population.

[54] ss. 77 (1), 86 (1), 90 (1). The Chief Justice is to be appointed after consultation with the Prime Minister, the members of the Public Service and Police Service Commissions after consultation with the Prime Minister and the Leader of the Opposition, and the Ombudsman after consultation with the Prime Minister, the Leader of the Opposition and the Leaders of other parties represented in the Assembly. The Governor-General may also prescribe which offices are to be created on the Ombudsman's staff (s. 96 (4)).

Personal responsibility for initiating the procedure for removal of the Chief Justice, the members of Commissions and the Ombudsman, also lies with the Governor-General. The officers concerned are removable only for inability or misbehaviour on the report of a judicial tribunal of inquiry appointed by the Governor-General in his discretion. The initiative in setting in motion the machinery for removing the Commissioner of Police, the Director of Public Prosecutions, the Director of Audit and the Electoral Commissioner, who also have judicial security of tenure, rests with the appropriate Service Commission, but the members of the judicial tribunal of inquiry are still appointed by the Governor-General in his discretion.[55] For superior judges, apart from the Chief Justice himself, the responsibility for setting the machinery in motion rests with the Chief Justice; before removal can be ordered a reference must be made to the Judicial Committee of the Privy Council.[56]

If, of course, the Governor-General were to be an obedient instrument of an authoritarian Prime Minister, these safeguards would be valueless. It was therefore agreed at the 1965 Conference that established conventions relating to the appointment and removal of a Governor-General of an independent Commonwealth country would be varied in the case of Mauritius. First, in recommending the appointment, "the Prime Minister would take all reasonable steps to ensure that the person appointed would be generally acceptable in Mauritius as a person who would not be swayed by personal or communal considerations." Secondly, the first Governor-General would be a non-Mauritian and his name would be agreed between the British Government and the Mauritian Prime Minister before it was submitted to Her Majesty; in fact the first Governor-General of Mauritius was Sir John Rennie, the last Governor of Mauritius, and he was succeeded six months later by Sir Leonard Williams, formerly General Secretary of the Labour Party. Thirdly, once appointed the Governor-General would not be removed "unless a recommendation was made to Her Majesty for the termination of his appointment on medical grounds established by an impartial tribunal appointed by the Chief Justice." [57]

Internal Security

Mauritius has a regular police force and a small but efficient special mobile force; they were not able to cope with the communal rioting early in 1968 without the assistance of British contingents.

The police force is under the command of a Commissioner of Police; at present he is an expatriate. He is appointed by the Police Service Commission after consultation with the Chief Minister,

[55] ss. 78 (4)–(6), 92.
[56] s. 78 (5).
[57] Cmnd. 2797 (1965), p. 8. These provisions do not appear in the Constitution; it was considered inappropriate to limit Her Majesty's prerogative powers in these matters by means of the formal terms of a constitutional instrument.

and has judicial security of tenure; as has been noted, only the Commission can initiate the procedure for his removal. In the operational control of the police the Commissioner is subject to *general* directions of policy with respect to the maintenance of public safety and order given by the responsible Minister[58]; the Minister exercising these functions is in fact the Prime Minister.

In accordance with an inter-governmental Agreement,[59] provision has been made for assistance and advice on the staffing, administration and training of the police forces to be supplied by volunteer members of the British armed forces stationed in Mauritius. If a threat to the internal security of Mauritius arises, the British and Mauritian Governments will consult together.[60]

Courts and Judiciary

Reference has already been made to the Judicial and Legal Service Commission, which appoints and removes judicial officers.[61] There is a Supreme Court, consisting of the Chief Justice (appointed by the Governor-General in his discretion after consultation with the Prime Minister), the Senior Puisne Judge (appointed on the advice of the Chief Justice) and other puisne judges appointed on the advice of the Judicial and Legal Service Commission (ss. 77, 78, 80). The jurisdiction of the Supreme Court is set out in the Constitution; it has original jurisdiction in cases where contravention of the guarantees of fundamental rights is alleged and in other constitutional questions, and questions of constitutional interpretation arising before other courts are referable to the Supreme Court.[62] Provision is made for the circumstances in which appeals will lie to the Privy Council.[63]

Fundamental Rights

The constitutional Bill of Rights (Chapter II) has seventeen sections; its terms are similar to those adopted in other Commonwealth constitutions, but there are some special features.

(i) The declaratory section (s. 3) lists "freedom to establish schools" among the fundamental freedoms; and there is a separate section (s. 14) guaranteeing the right to send children to non-government schools and the right (subject to qualifications) of religious denominations and religious, social, ethnic and cultural organisations to establish and

[58] Constitution, ss. 72, 90, 91, 93.
[59] Cmnd. 3685 (1968).
[60] Mutual Defence and Assistance Agreement (Cmnd. 3629 (1968), art. 4).
[61] See also ss. 85, 86; Sched. 2; and p. 614, *ante*. The Commission is composed of the Chief Justice as chairman, the Senior Puisne Judge, another judicial member appointed on the advice of the Chief Justice, and the Chairman of the Public Service Commission.
[62] ss. 17, 83, 84.
[63] s. 81; see also S.I. 1968 No. 294.

maintain schools at their own expense. In fact Government aid is provided to denominational schools.

(ii) The guarantee of freedom from discrimination expressly mentions differential treatment attributable to caste (s. 16 (3)).

(iii) Derogation from basic freedoms (*e.g.*, privacy, conscience, expression, assembly, association, movement) is permissible for prescribed purposes unless the restriction in question is shown "not to be reasonably justifiable in a democratic society." The onus of proving unreasonableness is thus cast upon the person complaining of unconstitutional restraint; the formulation of the permissible grounds for derogation departs from the convoluted wording of recent constitutions and reverts to the original Nigerian model.

(iv) Three of the provisions under which liberty of the person may be restricted are of interest: arrest under an order of the Commissioner of Police upon reasonable suspicion of engaging in activities likely to cause a serious threat to public safety or order (s. 5 (1) (*k*)); an order restricting a person's movement or residence or his right to leave Mauritius (s. 15 (3) (*a*), (*b*)); and a preventive detention order made during a state of emergency (s. 18). In each of these situations the person affected is entitled to have his case reviewed before an independent tribunal, with a legal chairman, appointed by the Judicial and Legal Service Commission; procedural safeguards are provided; in the first two of these situations the decision or recommendation of the tribunal is binding but in the last the recommendation is advisory only.

(v) A proclamation of a state of emergency (under which a number of the guarantees may be partly suspended) lapses unless it is approved within a short period by a two-thirds' majority of the full membership of the Assembly (ss. 18 (1) (2)).

The Ombudsman

The constitutional provisions for the office of Ombudsman [64] are based on the writer's own recommendations of 1964,[65] with modifications made in the light of subsequent discussions and the rules adopted for the Ombudsman in Guyana [66] and the Parliamentary Commissioner for Administration in Britain.[67]

The main differences between the Mauritian Ombudsman and the British Parliamentary Commissioner are the following:

[64] Constitution, ss. 92, 96–100.
[65] Mauritius Legislative Assembly, Sess.Pap. No. 2 of 1965, paras. 37–48.
[66] S.I. 1966 No. 575, Sched. 2, arts. 52–56 and 3rd Sched.
[67] Parliamentary Commissioner Act 1967.

(i) The Mauritian Ombudsman is appointed not on the advice of the Prime Minister but by the Governor-General in his personal discretion.

(ii) He is removable not by parliamentary action but in pursuance of an adverse report by a judicial tribunal of inquiry.

(iii) He has power to entertain complaints of injustice sustained by maladministration perpetrated by central government departments and officials when they are put to him directly by members of the public, and can conduct investigations purely on his own initiative.

(iv) He can investigate complaints against the police and persons or boards inviting tenders for government contracts.

(v) He is entitled to report adversely if he concludes that the action in respect of which the complaint was made was, *inter alia*, "based wholly or partly on a mistake of law or fact" or "otherwise unjust or manifestly unreasonable" (s. 100 (1)), and the types of recommendations that he is empowered to make (see s. 100 (2)) include reform of the law.

(vi) He is not precluded from investigating a complaint merely because the subject-matter falls within the constitutional guarantees of fundamental rights (s. 97 (6)).

(vii) He must not, however, conduct an investigation if he is given notice by the Prime Minister that the action complained of was taken by a Minister or Parliamentary Secretary in the exercise of his deliberate judgment (s. 97 (7)) or that the investigation of the matter would not be in the interests of the security of Mauritius (s. 97 (9)); nor can the Ombudsman call for any document or information if the Attorney-General notifies him that its disclosure, or the disclosure of documents or information of that class, would be contrary to the public interest in relation to defence, external relations or public security (s. 99 (5)).

Although the exclusions from the Ombudsman's area of competence are generally narrower than in Britain, the first of the three mentioned above is obviously open to criticism; it indicates that there were problems in securing agreement on the establishment of the office.

An Ombudsman for Mauritius will not be a panacea for all ills; he can nevertheless be expected to fulfil functions more important than in Britain, for in Mauritius allegations of official malpractices are far from being uncommon. Because of inter-communal suspicions, it was generally felt desirable that the first Ombudsman ought to be appointed from outside Mauritius. It is a sad comment on the problems of small and far-away countries that seven months after independence the institution still existed only on paper.

Constitutional Amendment

The Constitution of Mauritius is rigid. Bills for ordinary constitutional amendments require the support of two-thirds, and for the amendment of specially entrenched sections (comprising nearly a half of the Constitution) the support of three-quarters, of the total membership of the Assembly at the final vote.[88] At the present time this means that it will be impossible to alter any specially entrenched section, and difficult to alter other sections of the Constitution, in the absence of the acquiescence of the official Opposition.

Miscellaneous

The Constitution also includes provisions relating to citizenship (Chap. III)[89] and the independent offices of Director of Public Prosecutions (s. 72) and Director of Audit (s. 110). Salaries of the holders of major non-political offices are charged on the Consolidated Fund and are not reducible during the tenure of the occupant (s. 109).

Although the general regulation of the public service is placed within the exclusive jurisdiction of the Public Service Commission, the principal representatives of Mauritius abroad are appointed on the Prime Minister's advice; he must consult the Commission before any such appointment is made from within the public service (s. 87). Appointments of departmental heads within Mauritius and to the office of Secretary to the Cabinet are made by the Public Service Commission, but only with the Prime Minister's concurrence (s. 89 (4)).

Regulations or orders having the effect of depriving persons of personal liberty or restricting freedom of movement or creating new criminal offences or imposing new penalties must be laid before the Assembly subject to the negative resolution procedure; the requirement of laying may, however, be dispensed with by Parliament during a state of public emergency (s. 122).

VI. Retrospect and Prospect

The constitutional structure of Mauritius is directly attributable to communal and political divisions in the period immediately preceding independence. The structure is relatively rigid; if the picture in the kaleidoscope changes shape, it is to be hoped that the structure will not prove so rigid as to be unalterable by the prescribed procedures.

For all its peculiarities, Mauritius is a genuine liberal democracy. Some see it as an exemplar of government by discussion; some would wish for more government and less discussion. But the burdens of historical tradition, underlying communal tensions, claustrophobic remoteness and humid climatic conditions all tend to slow down the

[88] Constitution, s. 47.

[89] See also Mauritius Independence Act 1968, ss. 2, 3.

tempo of decision-making, urgent though the immediate problems may be. A higher value is placed on the achievement of a consensus than on dynamic leadership. The various constitutional provisions requiring the Prime Minister to consult the Leader of the Opposition are not mere formalities; indeed, Sir Seewoosagur Ramgoolam, fully aware of the damage that can be wrought by political acrimony aggravated by communal hostility, has maintained close personal relations with Mr. Duval, and the practice of consultation has extended far beyond the minimum constitutional standards. Perhaps a more satisfactory political system would be one bringing the present Opposition back into an all-party coalition government—Mauritius can ill afford a division between "ins" and frustrated "outs"—but such a team would be an unruly one, and at the moment personal resentment of the Opposition's recent tactics is too strong within the Government's ranks for such a prospect to be realised.

Meanwhile the Opposition's strength has been debilitated by defections. Because its support has rested primarily on a communal basis, it will have difficulty in achieving power by constitutional means in the foreseeable future. The main threat to the Government's position may come from the growing ranks of the underemployed, unemployed and unemployable; opposition attracting the support of those forces could, in time, be formidable.

The position of Rodrigues may also give rise to serious problems. Whether the establishment of an elected council on the island will mollify local feelings is doubtful. The alienation of Rodrigues, too long neglected by Britain and Mauritius, is a fact of life. Mauritius proclaims itself to be "the key to the Indian Ocean"; it maintains close political, economic and strategic links with Britain [70]; but if Rodrigues were to purport to cut itself adrift, the key could well change hands, for there is no reason to suppose that Mauritius unaided would be capable of exercising effective coercion.

On the Mauritian style of politics, an unending source of fascination, perhaps it is wisest to leave the last word to the voice of authority. "Why," said the Dodo, "the best way to explain it is to do it." [71]

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[70] Mutual Defence and Assistance Agreement (Cmnd. 3629 (1968)). The United Kingdom is empowered to station forces on the island, to operate a telecommunications system and to exercise landing rights at Plaisance Airport, but it cannot intervene in the internal affairs of Mauritius without the request and consent of the Government of Mauritius and is under no obligation to act on such a request.

[71] Lewis Carroll, *Alice in Wonderland*, Chap. 3 (on the Caucus race).

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THE COMMISSION MERCHANT AT COMMON LAW

Inadequacy of Agency Law

The problem of the intermediary in commercial transactions is one that has created difficulties for many centuries in establishing a suitable legal formula to reflect commercial necessity and the current pattern of economic relationships.[1] In other words, the law has found considerable difficulty in developing separate categories of agent, which although quite distinct in the commercial sense, have no special provision made for them by the law, and to ascertain the law that governs them, one is forced back upon the general principles of the law of agency which often bear little relevance to the situation in question. Some categories, such as the broker, have been recognised as such in both the common law and in continental law systems, and given a definite legal status as an intermediary acting on behalf of both parties to a contract of sale and purchase in respect of commodities or services.[2] Beyond that, however, as far as the common law is concerned, there has been a remarkable degree of reluctance to acknowledge that a rigid division of parties into either "principal" or "agent," in the strict legal sense of the words, does not offer a suitable framework for many commercial relationships.

Many commercial intermediaries often do not fit easily into the simple classification of an "agent." Some may, in the legal sense, be both principal and agent simultaneously, while others through the complexity of their relationships may prove incapable of being allocated either status without a grave disregard of their true commercial position. Where there has been considerable case-law, as in the field of estate agency, the law has sometimes responded to the challenge and classified in some detail the special usages of the trade, but this has been essentially dependent on a willingness to litigate, as this provides the only medium of legal growth in a case-law

[1] Commercial transactions are no respecter of legal jurisdictions and national boundaries, and it is often only possible to find the exact nature of a commercial transaction from a study of practice and law relating to more than one country. For this reason a comparative study of the commercial law of the Commonwealth countries subject to the common law is long overdue, and a classification of combined precedents in purely case-law subjects, such as agency, would certainly be of considerable value, bearing in mind the paucity of case-law in individual countries. The question is essentially a complementary one to the problem of conflict laws—see Falconbridge, *Conflict of Laws*, Chap. VIII.

[2] See *Bowstead on Agency*, art. 2; *American Restatement*, Agency, s. 1 (d). Also note 11 below.

system,[3] except by statutory provision, which is seldom done. Where, however, there is a reluctance to litigate, as in the field of commercial sales, there has been a corresponding reluctance to develop the law into defined channels. Whether this is through a lack of interest in commerce, or a desire to force all relationships into one or other of the forms existing at common law, is debatable, but, whatever the reason, the courts have found the greatest difficulty in achieving a realistic classification of the agent in commerce. Instead there has often been recognition of a particular commercial usage in an individual case, without any attempt to view the problem in a wider perspective. Accordingly, although it can be argued that such an approach offers a wide measure of flexibility in trading relationships, it can equally be said that the development of the common law has been retarded by the failure of the courts to recognise that if a similar custom exists in a number of markets it could be incorporated into the law as a general principle applicable in defined circumstances. Flexibility may of course to some extent be sacrificed, but the gain in certainty, on which businessmen probably depend to a greater degree, will outweigh any such theoretical loss. It was only through such an approach in past centuries that the commercial law of England was gradually built up from the custom of the merchants.[4] It therefore seems unfortunate that the common law which prides itself on flexibility should have failed to develop to any extent in the field of commercial agency.[5]

The Contract of Commission: Analogous Relationships

By contrast, the less empiric approach of the civil lawyer has witnessed a more logical attitude in the continental civil and

[3] "In common law special legal relations are not to be confined within the strait jacket of definitions; *elegantia juris* may be achieved only at the expense of the dynamic element in our law," F. E. Dowrick, "Relationship of Principal and Agent" (1954) 17 M.L.R. 24, 88. See also McIntyre, *Law Relating to Auctioneers and Estate Agents*.

[4] Admittedly it can be argued that the rule in *Edie* v. *East India Company* (1761) 2 Burr. 1216, that a custom when once incorporated into the common law cannot be changed, has perhaps mitigated against such development, but it offers no excuse for the virtual fossilisation of an incomplete agency structure. As Willes J. stated, "It is an elementary proposition that a custom of trade may control the mode of performance of a contract, but cannot change its intrinsic character," *Robinson* v. *Mollett* (1875) L.R. 7 H.L. 802. However, such a proposition should not be interpreted as precluding any development of the common law by the adoption and absorption into the body of substantive law of such custom.

[5] One notable concession to commercial practice, however, is the doctrine of the undisclosed principal, but even this has been a source of constant mental indigestion to the academic lawyer, and on occasions to the courts too. See Pollock (1887) 3 L.Q.R. 356; (1896) 12 L.Q.R. 204; (1898) 14 L.Q.R. 2. Ames, "Undisclosed Principal—his rights and liabilities," 18 Yale L.J. 443; Cheshire and Fifoot, *Contract*, 6th ed.; *Armstrong* v. *Stokes* (1872) 7 Q.B. 598, 604, *per* Blackburn J.

commercial codes.[6] In other words, for the law to limit itself to the notion that an agent is merely a representative who brings his principal into direct contractual relationship with a third party, does not give legal recognition to the important sector of commercial agency where it is not an essential element of the representative act for the agent to bring his principal into direct contractual relationship with a third party. In the field of international sales and transportation the reverse is often true, in that by usage the agent is not able to create privity between his principal and the third party. Here the intermediary acts in a dual capacity, being accountable to his principal and with the same rights and liabilities as any other agent to his principal, but as he does not bind his principal contractually to a third party, he himself stands in the position of a principal to the latter.[7]

This relationship does not fit into the orthodox classification of agency law either at common law or civil law. To remedy this, the civil law has created the contract of *commission* for the independent commercial agent, to overcome the problem of retaining the concept of representation by an agent, while vesting sole personal liability to a third party in the intermediary.[8] The commission merchant or *commissionaire* is therefore recognised as contracting with third parties in his own name,[9] although all contracts will be for the account of his principal, and, irrespective of whether the identity of the latter is disclosed, no privity of contract will be created between principal and third party.[10] Thus in the contract of *commission*, while still accepting the concept of representation as in the common law of agency, the requirement of creating privity between principal and third party ceases to exist.

[6] Juridically the distinction is accepted between a contract of perfect representation and of *representation imparfaits*. English law has not been prepared to accept the latter category where privity of contract is not created between principal and third party. See Ripert, *Traité elementaire de droit commercial*, ss. 2351 *et seq.*

[7] Exceptionally in the case of the *commissionaire de transport*, by art. 101 C. Com. (France), the consignor does obtain contractual rights under the contract of carriage entered into by a commissionaire: "la lettre de voiture forme un contrat . . . entre l'expediteur, le commissionaire et le voiturier." Similarly in Dutch law by art. 90 C. Com. These provisions are exceptional, though, and normally the consignor is not a party to the contract—*e.g.*, arts. 407 *et seq.* H. G. B., similarly in the Swiss and Italian codes.

[8] For a discussion of the problem see Muller-Freienfels, "Comparative Aspects of the Undisclosed Principal" (1955) 18 M.L.R. 38.

[9] By art. 1984 C. C. (France) the agent must act in the name of his principal, whereas the commissionaire acts in his own name (art. 94 C. Com.) although both act for the account of their principal. It is interesting to note that in Louisiana the local Civil Code provision to this effect has been held by the courts to be not essential. Such a declaration means that in this respect there is a movement towards the common law doctrine of the undisclosed principal—*Sentell* v. *Richardson* 211 La. 283 (1947) and 7 La.L.Rev. 409.

[10] See note 7. In French law ambiguity arises through the provision in arts. 94 *et seq.* C. Com. that the rights and liabilities of a commissionaire, who acts in the name of his principal are determined by s. 1984 C. Com.: *i.e.*, it is treated as *mandat*, not as *commission*.

Although the contract of commission has been incorporated into the codes of virtually all civil law countries,[11] as no provision exists at common law to achieve a similar effect it has been necessary to rely upon the uncertainties of trade custom or presumption with the attendant problems of providing such to the satisfaction of the court before which it is pleaded. However, the question arises as to whether it is in fact an essential element of the contract of agency for privity to be created between principal and third party, or whether a contract of agency can still exist when the function of the agent is to contract for the account of his principal with a third party, but in his own name without creating privity of contract between the two. In other words, does a concept analogous to the civil law contract of *commission*[11] exist at common law, or is the marked absence of such a concept in the standard works on agency a true reflection of the state of the law of agency? It has already been mentioned that the undisclosed principal is a concession to commercial practice, and where in such a relationship the third party elects to hold the revealed agent liable, no privity can be said to exist between the third party and the later disclosed principal, even though the relationship between the latter and the agent still remains a fiduciary one and the rights and liabilities of principal and agent remain unchanged in relation to each other.[12] Similarly in various commodity markets by custom the third party may hold the broker personally liable as a principal where he does not disclose his principal's name, thus although not creating privity between principal and third party, still leaving the broker's relationship with his principal unaltered.[13]

Such developments in the London markets have only taken place to answer the needs of commerce. Regretfully though, for the past century the courts have invariably explained away such usages as being mere custom, when a few generations earlier Lord Mansfield would have grasped eagerly at an opportunity to expand the categories of the common law. For example, it is a common custom for brokers in certain markets to act as principals in relation to each other while still remaining agents in relation to their principals.[14] Such a relationship may be combined with non-

[11] Arts. 94 *et seq.* C. Com. (France); arts. 407 *et seq.* H. G. B.; Liv. 1, Tit. vii, C. Com. (Belgium); arts. 244 *et seq.* Cod. Com. (Spain); art. 1781 C. C. (Italy); arts. 425 *et seq.* C. O. (Swiss) etc.

[12] There is considerable divergence as to the exact field covered by agency law—see A. Conard, "What's wrong with Agency?" (1949) 1 *Journal of Legal Education*, 540 and P. Mechen, Vol. 2 (1949) 208.

[13] See p. 624 above.

[14] *e.g.*, in the Liverpool Cotton Futures Market under the rules of the Liverpool Cotton Association, the broker binds himself as a principal to the seller by the standard contract used, while remaining an agent in relation to his principal the buyer—*Woodward* v. *Wolfe* [1936] 3 All E.R. 529. In the hops market a custom exists that the broker is liable for the performance of a contract if he does not disclose his principal's name at the time the contract is made, even though he contracted as a broker for his principal—in *Pike* v. *Ongley* (1887) 18 Q.B.D. 708, this was held to give a remedy

disclosure of principals as in *Newall* v. *Tomlinson*.[15] Here two Liverpool cotton brokers were acting for undisclosed principals. By market usage each treated the other as a principal for the due performance of the contract, and the selling broker could not therefore bring himself within the rule that he had received money on account of his principal and had paid it over to him. He therefore had to account to the buying broker for an erroneous overpayment by the latter. In such a situation where there is either a prior acceptance of liability or an election to hold the agent liable instead of the undisclosed principal, the intermediary is both a principal to the third party and an agent to his principal. In neither case is privity created between principal and third party. However, to enter into contractual relationships on behalf of a principal without making the latter directly liable on a contract is as much a representative act as when an agent contracts on his own behalf as well as on behalf of his principal.[16] In both such cases the principal will be equally liable to reimburse his agent for expenses etc., as will the agent be accountable to his principal for secret profits etc.[17] Equally, parallel situations are to be found in other categories of commercial agent, such as the forwarding agent, where the latter commonly accepts personal responsibility to a carrier while remaining an agent to his principal.[18] Similarly the same situation is developing in the case of the travel agent, and it is worthy of note that in the civil law where he is not yet the subject of a contract of *commission*,

against the broker as well as his principals—see also *Crooper* v. *Cook* (1868) 8 C.P. 194; *Baker* v. *Sharma*, 8 M.C. 15 (Malaya) concerning rubber brokers; *Kaltenbach* v. *Lewis* (1885) 10 App.Cas. 617 concerning brokers in the shellac trade; *Canada Grain Co.* v. *Mitton Bros.* (1922) 63 D.L.R. 488—by the rules of the Winnipeg Exchange, members (*i.e.*, brokers) are required to buy and sell as principals. A similar practice exists on the London Metal Exchange.

[15] (1871) L.R. 6 C.P. 405.

[16] *Montgomerie* v. *U.K.M.S. Assoc.* [1891] 1 Q.B. 372, "the parties (to the contract) can by their express contract provide that the agent shall be the person liable . . . to the exclusion of the principal . . . or to sue," *per* Wright J. It is really that the authority granted to the agent is of a different extent—see D. J. Hill, "Agents with special responsibility" [1964] J.B.L. 304.

[17] It should not be forgotten that the commission merchant is remunerated by commission payable by his principal as for any other agent; the procedure is explained by Dixon C.J. in *Robertson (Aust.) Pty. Ltd.* v. *Martin* (1956) 94 C.L.R. at p. 36. In *Downie Bros.* v. *H. Oakley* (see note 44) it was pointed out that it was the duty of a buying agent to give his principal full benefit of all discounts and the fact that only 2½ per cent. commission was payable was irrelevant in considering the duties of an agent, which is the same whatever remuneration (*per* Adams J. at p. 737). In this case the concept of an agency relationship is clearly present even though no privity was created between buyer and seller (for facts see note 42).

[18] The forwarder accepts liability, *inter alia*, for the carrier's and port authority's charges (*P. S. A. Transport Ltd.* v. *Newton Landsdowne* [1956] 1 Lloyds Rep. 121), dead freight (*Anglo Overseas* v. *Titan Products* [1959] 2 Lloyds Rep. 152), and for air carrier's charges (*Perishables Transport Ltd.* v. *N. Spyropoulos Ltd.* [1964] 2 Lloyd's Rep. 379, and note by D. J. Hill [1965] J.B.L. 256). As to travel agents see D. J. Hill, "Travel agents and the Law," *Modern Transport*, October 2 and 16, 1965.

criticism has been levelled at this lacuna, and recommendations made to remedy this.[19]

ENGLISH PRECEDENTS

In arriving at any conclusion as to whether the commission merchant exists as a recognised category of commercial agent at common law, merely to consider the precedents of any one country on its own seems to confirm that they are scanty and do not warrant the conclusion that such a category does exist. If however a broader approach is taken, and the case-law of the principal common law trading nations examined as a comprehensive body of law, a different picture emerges. Unfortunately though, a uniform terminology has not been used by the courts, even within any one jurisdiction. Various names, such as commission agent, buying agent, indent agent, confirming agent etc., have all been used at different times to describe various overlapping commercial transactions, with little objective investigation as to the particular function in fact performed by the intermediary in question, and often with a noticeable lack of knowledge of trading practice.[20] This may of course account for the absence of any attempt to define such categories of commercial agent.

Irrespective however of the nomenclature used a regular pattern of such relationships can be traced in a series of precedents. The keystone is the well-known case of *Ireland* v. *Livingston*,[21] where a

[19] The French Reform Commission for the Code de Commerce recommended that the travel agent be made a *commissionaire de transport de personnes*, Rodiere, *Droit de Transport*, s. 1405. As the law stands in France, the travel agent must be treated as either a *mandataire*, or as a carrier himself, much as at common law at present (see note 18).

[20] There seems to be a noticeable lack of knowledge among the judges of the true nature of the more complex commercial transactions they are required to adjudicate upon—*e.g.*, in *African Commercial Corpn. Ltd.* v. *Hussainali & Co.* (1959) 25 M.L.J. 124, Buttrose J. discussed the responsibility of a confirming house and stated that the role of one is "purely financial" (at p. 125) and that it is not concerned with the contract of sale and is not responsible for the quantity and quality of the goods shipped. The responsibilities of a confirmer in fact vary as to the type of transaction undertaken and such a definition merely takes into account one particular method used—C. M. Schmitthoff, "Confirmation in Export Transactions" [1957] J.B.L. 17. In *Stursi & Sons Ltd.* v. *House of Youth Pty. Ltd.* [1960] S.R.(N.S.W.) 220, where in a typical case the defendant agreed in Switzerland to buy a consignment of cloth for shipment to Australia, and H. & Co., a London confirming house were to confirm the order guaranteeing the price. In the ensuing action after the defendant withdrew from its agent, H. & Co., authority to accept a bill of lading, the court stated "*and so we are told*, a confirming agent for a buyer is one who guarantees to the seller that the buyer will pay the price" (at p. 222). From the prefatory clause it can be seen that the court seemed rather uncertain as to what a confirming house in fact does, and failed to realise that the essential function of a confirmer is often to guarantee the whole transaction and not only the price.

[21] (1872) 5 H.L. 395. It is conceivable that Blackburn J. was influenced in his approach by the fact that Mauritius, where the plaintiff resided, was subject to French law which accepted the existence of the contract of *commission*. His other judgments referred to elsewhere in this article seem also to reflect a civil law influence generally.

Liverpool merchant employed a firm of commission merchants in Mauritius to buy sugar on their behalf. Regrettably the various members of the court used different terminology to describe the plaintiff, but that of Blackburn J. seems to be preferable. He described him as a commission merchant, and then explained the practice followed in such transactions.[22] He stated that it is

> " very common for the consignor to be an agent, who does not bind himself absolutely to supply the goods, but merely accepts an order by which he binds himself to use due diligence to fulfil the order. In that case he is bound to get the goods as cheaply as he reasonably can, as the sum inserted in the invoice represents the actual cost and charges at which the goods are procured by the consignor with the addition of a commission." [23]

He added that " the agent . . . does not take upon himself any part of the risk or profit which may arise from the rise and fall of prices, and is entitled to charge commission because there is a *contract of agency*." [24] He continued that the seller in such a transaction contracted with the commission merchant, and that no privity existed between the former and the foreign buyer, on whose behalf the latter contracted. As the transaction between the commission merchant and the consignee was a contract of sale, the former was in the position of a vendor. However, he emphasised that this did not prevent a contract of agency existing between the parties, as the contract of sale was merely " super-added " to the agency relationship of which it was but a technical part, as a method of combining the personal responsibility of the commission merchant to the seller under the contract with the transference of the property to the buyer of the goods in question.[25]

Subsequently, in *Robinson* v. *Mollett*,[26] when considering the custom of the tallow trade, Blackburn J. reaffirmed his earlier dicta in *Ireland* v. *Livingston*.[27] Although by a majority judgment the House of Lords reversed the judgment of the Exchequer Chamber, his minority advice (supported by Amphlett B.) is of considerable significance, especially considering the " great difference of judicial opinion in the case." [28] Blackburn J. stated that:

> " any person, if he chooses, may give an order to an agent to buy as his agent, not only with an express dispensation from any

[22] He stated that the commission merchant makes an invoice " debiting the consignee with the agreed price (or the actual cost and commission . . . and giving him credit for the amount of freight which he will have to pay to the shipowner on actual delivery, and for the balance a draft is drawn on the consignee which he is bound to accept (if the shipment is in conformity with his contract) on having handed to him the charterparty, bill of lading and policy of insurance " (at p. 406).

[23] *Ibid.* at p. 407.

[24] *Ibid.* at p. 406.

[25] *Ibid.* at p. 409.

[26] (1875) L.R. 7 H.L. 802.

[27] (1872) 5 H.L. 395.

[28] (1875) L.R. 7 H.L. 802, 832, *per* Lord Chelmsford.

> obligation to establish privity of contract between him and the person from whom the agent buys, but even expresly refusing authority to the agent to establish such privity. This is the ordinary authority given to a foreign commission merchant, who is not allowed (far less required) to establish privity of contract between them." [29]

Significantly, he added that,

> "This however, in no way interferes with the existence of a fiduciary relation, or the consequent obligation on the agent not to put his own interest in conflict with that of his principals. I cannot, therefore, see that there is anything in the custom proved in this case, so far as it dispenses with establishing privity of contract between the person giving the order and the ultimate vendor, which is wrong, so as to make the custom void, as against policy, or inconsistent with the fundamental principles of right and wrong."

Regrettably the other members seemed more concerned to emphasise that a usage which changes the character of a broker and the nature of the dealing cannot be supported, and in interpreting trade custom, rather than the basic question of whether the obligation to create privity of contract is an essential element of a contract of agency.

However, taking these two dicta of Blackburn J. together, there is a strong argument that there existed an embryonic growth from which a native contract of *commission*, or a concept closely akin to it, could have developed had it not been for the more pedestrian outlook of his colleagues on the bench. As a result, the principles in *Ireland* v. *Livingston* [30] concerning the commission merchant have provided a foundation that has not been further developed by the English law courts. Recently however, in a case concerning an export transaction, in distinguishing the methods whereby an agent can conclude a contract on behalf of his principal, Donaldson J. reaffirmed, at first instance, that an agent can do so,

> "by creating privity of contract between himself and the third party, but no such privity between the third party and his principal. In other words, in relation to the third party he is a principal, but in relation to his principal he is an agent." [31]

In the event this method was not applicable to the transaction in question, but it is to be noted that on appeal the dicta of Donaldson J. created no dissent or comment among the members of the Court of Appeal.[32] However, the failure to develop this concept may of course be, as Diplock L.J. observed in *Anglo-African* v.

[29] *Ibid.* at pp. 809–810.
[30] (1872) 5 H.L. 395.
[31] *Teheran-Europe Co. Ltd.* v. *S. T. Belton (Tractors) Ltd.* [1968] 1 Lloyd's Rep. 211, 216.
[32] [1968] 2 Lloyd's Rep. 37.

Mortner,[33] because prior to the latter case there had been no case-law in England dealing with the relationship between commission merchant and overseas buyer, and it is perhaps because of this preoccupation with the home element of the transaction, that is, disputes between "agent" and supplier, which in any case is that of two principals contracting together whatever the former's relationship with the buyer, that has prevented the English courts from taking a wider perspective. However, not unexpectedly, both on the grounds of convenience and jurisdiction, litigation between commission merchant and overseas buyer has invariably occurred in the latter's domicile, and it is therefore in other parts of the Commonwealth that the relevant case-law is found.

Commonwealth Precedents

It is in a judgment by Salmond J., of immortal fame, in the New Zealand Court of Appeal case of *Bolus & Co. Ltd.* v. *Inglis*[34] that a classification is to be found of the several categories of commercial intermediary who may act for a foreign buyer in the United Kingdom. The case itself was an action by a United Kingdom agent against a New Zealand buyer. In a judgment of some importance, he divided such transactions into three distinct categories, as follows:

> "When a New Zealand merchant procures the goods of an English manufacturer through an intermediary in England, the relationship so established between the New Zealand merchant and the English intermediary may be of any one of three kinds. In the first place, it may be said that of vendor and purchaser, that is to say, the intermediary may purchase the goods from an English manufacturer and resell them to the New Zealand merchant. In the second place, the relation may be that of *agency*, whereby the English agent is authorised to purchase the goods in his own name and on his own responsibility from the English manufacturer, and to send them to his principal, the New Zealand merchant, but is not authorised to make in the name of or on behalf of that principal any contract between him and the English manufacturer, or to impose on the principal any contractual liability towards the manufacturer. In such a case the only contract of purchase and sale is that which is made between the English agent and the English manufacturer, and the only liability of the New Zealand merchant is towards his own agent. The relation between the English agent and the New Zealand merchant in such a case is *merely one of agency*, and not one of vendor and purchaser, though in respect of the right of stoppage *in transitu*, and possibly in some other respects, it is analogous to a contract of sale and purchase and

[33] [1962] 1 Lloyd's Rep. 610, 620—this case was the exception to the rule—*cf. Cassaboglou* v. *Gibb* (see note 38) where the dispute was between a home buyer and a commission merchant in Hong Kong, which is really the same situation, and to which Diplock L.J. did not refer on this point.

[34] [1924] N.Z L.R. 175.

possesses similar incidents. The dictum of Blackburn J. in *Ireland* v. *Livingston*[35] to the effect that the relation between a commission agent and his principal is that of vendor and purchaser is explained in this sense by the Court of Appeal in the subsequent case of *Cassaboglou* v. *Gibb*.[36] In the third place, the relation may be that of agency in the strict sense, the agent being authorised not merely to buy goods from the English manufacturer but to buy them in the name of the New Zealand principal, and make him responsible to the manufacturer for the price of the goods."

He added that the conduct and the intentions of the parties will decide into which category a transaction will fall,[37] and that the contract in *Bolus'* case fell within the third category.

The first and third categories offer few problems. In the first, the question of agency does not arise at all, except in a commercial sense,[38] with no legal implications, and in the third, a simple agency relationship exists where privity is established directly between third party and principal, the agent having no personal liability at all, unless a *del credere* relationship is also entered into.[39] Where however no simple vendor and purchaser relationship exists to place it in

[35] (1872) 5 H.L. 395, 409.

[36] (1888) 11 Q B. 797.

[37] [1924] N.Z.L.R. at p. 174. Although Salmond J. did not mention it, a further category of intermediary could be added, where the agent confirms a transaction, and becomes liable as a principal to a third party, for either the payment of the price or the whole transaction, while still creating privity between principal and third party—*Sobell Industries* v. *Cory Bros.* [1955] 2 Lloyd's Rep. 82—a Turkish buyer ordered a supply of radio sets from the plaintiff manufacturers, the order being transacted through the defendant Cory Bros., who were acting as confirming agents in the transaction. On the failure of the buyer to accept the whole consignment, the defendants in turn refused to accept the balance of the goods. In an action for non-acceptance thereof, the defendants pleaded that they were in fact acting as agents for a disclosed principal in negotiating the contract, and therefore were under no liability themselves for non-performance of it. It was held however that as the defendants were acting in the capacity of confirming agents and the particular method used was to place an order themselves in their own names with the plaintiffs, they had in fact assumed the position of a principal in the contract of sale and were therefore liable themselves personally on the contract. As McNair J. stated, "there is nothing unusual in one party being both principal in one capacity and an agent, he may have these functions arising out of the same transaction." See also *Stansi & Sons* v. *House of Youth* [1960] S.R.(N.S.W.) 220.

[38] In *Anglo-African Shipping Co. of New York Inc.* v. *J. Mortner* [1962] 1 Lloyd's Rep. 610, the plaintiff confirming house confirmed an order by the defendant importer for a quantity of plastic sheeting from an American exporter. Through various delays in delivery, the importer refused to accept delivery. Here the confirmer was acting as a principal in the transaction, there being two separate contracts with the importer and the supplier respectively—no question of agency in the legal sense arose at all.

[39] The problem of *del credere* agency was discussed in *J. W. Wotherspoon & Co. Ltd.* v. *Henry Agency House* (1962) 28 M.L.J. 86. The plaintiff was a London confirming house and the defendant was its unofficial agent who found prospective buyers in Malaya. The former checked the credit of the buyer through its own agents and then confirmed orders forwarded by the defendant and goods were supplied direct to the Malayan buyer. The defendant received no commission from the confirming house, but from the

the first category, there is a presumption that it will fall in the second category, which is of particular significance as it recognises the true status of the independent commission merchant. As Salmond J. observed, the true meaning of Blackburn J.'s dicta in *Ireland* v. *Livingston* is revealed in the later case of *Cassaboglou* v. *Gibb*,[40] where it was acknowledged that although the commission merchant is a principal towards the third party, his relationship towards the buyer remains that of an agent and not that of vendor and purchaser. As Fry L.J. explained in the latter case, the question arises as to how property in goods is to pass from agent to principal without introducing a contract of sale:

> " . . . was the contract of principal and agent merged into that of vendor and purchaser? This must be a question of fact, and as a question of fact there was no such contract. It is said, however, that there must be such a contract inferred for two reasons, first because otherwise the property in the goods would not pass to the English merchant for whom the agent abroad bought them. In my judgment the property would pass. If the article was specific it would pass by the purchase, and if not specific, but was appropriated by the agent for his principal, it would pass by virtue of the appropriation. The other reason for inferring the relation of vendor and purchaser was said to be because the foreign agent who has bought for his principal has the right of stoppage *in transitu*, but that in my opinion, is no reason for such inference. Since . . . *Lickbarrow* v. *Mason*,[41] the person who stops the goods *in transitu* must be the consignor, but there are numerous cases in which the right has been allowed of stopping *in transitu* without the relationship existing of vendor and purchaser." [42]

firms supplying goods for the plaintiff. The latter charged the buyer 8½ per cent. buying commission, none of which was passed on to the defendant. In the case in question, the buyer went bankrupt after the plaintiff had shipped and invoiced the goods to him, the orders having been received through the defendant. In the resultant action against the defendant for the price as a *del credere* risk, the court held that the defendant was not liable as a *del credere* agent, as such an agency could not exist unless additional commission was paid for such a risk. Merely to receive commission was not enough, and here there was none in fact at all passing between the parties concerned, and the confirmer could not therefore hold him liable.

[40] (1883) 11 Q.B. 797.

[41] 1 Sm.L.C., 8th ed., 753.

[42] The facts were that a London merchant ordered the defendant, a Hong Kong commission agent to buy certain opium. This was unobtainable, by a mistake the defendant informed the plaintiff that it was, and bought and shipped inferior opium by mistake to the plaintiff, believing it to be the correct quality. The court held that the relationship between the parties was of principal and agent and not vendor and purchaser, and therefore only the actual loss was recoverable, and not the difference between the value as ordered and supplied. Fry L.J. (at p. 807) explained that although Blackburn J. said that "the legal effect of the transaction . . . is a contract of sale passing the property from the one to the other, and consequently the commission merchant is a vendor and has the right of one as to stoppage *in transitu*; but by the legal effect of the transaction he means the legal effect of an analogous contract to that of a contract of purchase and sale." A similar statement of the law was made by Roche J. in *R. & J. Bow* v.

It therefore appears that Fry L.J.'s solution of how property is to pass from the commission merchant to his principal without a contract of sale being implied, removes the principal objection to the concept of the commission merchant as defined above. It has been argued that in such cases as *Ireland* v. *Livingston* where privity has not been created between principal and third party that the courts have merely been referring to agents in a loose commercial sense, and not in a legal one, but this seems too facile a method of dismissing the various reasoned dicta on the subject.[43] It is quite clear in *Bolus'* case that Salmond J. meant exactly what he said, that is, that on good authority a representative can still be classified as an agent in the legal sense, without creating privity in the course of his representation between his principal and the third party, and that this is not a necessary result of an agency relationship.

A similar interpretation of *Ireland* v. *Livingston* was given in *Downie Bros.* v. *Henry Oakley & Sons*,[44] where the plaintiff, a London indent agent was instructed by the defendant, a New Zealand buyer, to purchase goods, which the plaintiff ordered in his own name and paid for. They were shipped to the defendant who refused them because the price was excessive. Adams J. stated that in such a transaction the agent's duty was to obtain the goods in accordance with the terms of his authority, to pay for them and arrange dispatch. He had no authority to pledge the defendant's credit, but was bound to check the goods as to their conformity with the contract, or else as they had been bought in the agent's name and paid for by him according to practice, the principal could neither reject the goods as against the seller nor assert any rights under the contract of sale as he was not privy to it. The net result would be that, provided the indent agent had acted within the scope of his authority, the principal would be obliged, in such circumstances, to take and pay for the goods and would be left without either a remedy against the seller, with whom they had no contractual relationship, or against their agent if the latter was not in breach of his duties as such. Again, approving Blackburn J.'s judgment in *Ireland* v.

Hill (1900) 87 Ll.L.Rep. 46, 47–48: "Now I have spoken of a person as being an agent although he is the sole party to the contract. It is often so that a person is an agent for another person, but yet makes contracts as to which he, the agent, is intended to be and is the only contracting party on that side. A very familiar instance is the one treated of by Lord Blackburn (in *Ireland* v. *Livingston*) of a commission agent . . . contracting in this country for the *ultimate benefit and really for the account of a foreign principal*. Between a commission agent . . . and the foreign principal there is no relationship except that of *agency*, but as between the British seller and the commission agent . . . as a buyer there is no party to the contract except the commission agent . . . on that side." It seems that bearing in mind the specific reference to Blackburn J.'s dicta in *Ireland* v. *Livingston*, that Roche J. intended to refer to an agent in the strict legal sense and not in any loose commercial sense as has been suggested in a recent article (see note 51).

[43] See note 51.

[44] [1923] N.Z.L.R. 743.

Livingston, he reiterated that although all rights in the contract were vested in the indent agent, the latter remained liable to his principal, the defendant, under their agency relationship.[45]

More recently, the courts applied the dicta of Salmond J. in *Witt & Scott Ltd.* v. *Blumenreich*.[46] The interesting point in this case is that although it concerned a confirming house, which from the legal aspect corresponds with the old commission merchant or indent agent, the actual litigation was between the actual buyer in New Zealand and the supplier in Australia. The latter, the defendant, wrote to Tozer Kemsley and Millbourn, the confirming house, in Melbourne, offering 150 pieces of Cameliex heavy coating in accordance with samples "submitted to you . . . goods will be delivered to you and paid for by your firm." The plaintiff buyer gave a signed order in Wellington to Tozer's "goods to be bought and shipped by Tozer Kemsley and Millbourn, Melbourne, as *Buying agents merely*, ship to Wellington as soon as possible." Tozers ordered from the defendant "for and on account of" the plaintiff, FOB Melbourne, in Australian currency together with a covering letter. The goods were invoiced by the defendant to Tozers, "sold to" Tozers. An account was sent to Tozers who paid the defendant. The goods arrived in Wellington and did not comply with the contract. In the ensuing action, it was necessary to prove that the contract was either made, performed, or broken in New Zealand. The plaintiff argued that the contract was made in Wellington by Tozers as the defendant's agents. The court however rejected this argument and held that the contract of sale was in fact made in Melbourne by the defendant with Tozers. No order was therefore made under Rule 48 (c). O'Leary C.J. stated that "apart from one's views of the documents," there was authority for holding that an *agency* existed between the plaintiff and Tozers, and that the latter had authority to buy goods in its own name and on its own responsibility from the defendant and to send them to the plaintiff. Tozers were not authorised to contract in the name of the plaintiff or to enter into contractual relations which would impose contractual liability on the defendant. The "practice of a New Zealand merchant procuring goods through an intermediary is well known and firmly established,"[47] the latter being known as a buying agent.

Similarly in the Australian case of *J. S. Robertson (Australia) Pty. Ltd.* v. *Martin*,[48] Dixon C.J. described confirming house procedure for an Australian buyer. A London confirming house was

[45] *Ibid.* at p. 746. See also *Butlers (London) Ltd.* v. *Roope & Co.* [1922] N.Z.L.R. 549 where the facts are similar.

[46] [1949] N.Z.L.R. 806.

[47] [1949] N.Z.L.R. at pp. 809–810.

[48] (1956) 94 C.L.R. 30. The procedure is typical of confirming houses throughout the Commonwealth. The London confirmer (who is actually described as a financier and shipper—McDonald Scales) paid the British supplier for the goods, took care of the shipment, paid the freight, insurance and other

used, and here again the confirmer addressed a printed order to the seller "order from McDonald Scales . . . our order number . . ." and in the margin "J. S. Robertson, Melbourne or Sydney." The contract was again held to be a sale by the seller to the confirmer, though the agency relationship between the latter and the buyer was apparent from the form of invoice used. Accordingly the buyer's claim for damages against the seller under the Sale of Goods Act was rejected. His argument that he never authorised the confirmer to become a buyer in its own right was rejected on the grounds that any excess of authority by the confirmer only affected its relationship with its principal, the buyer, but not with the seller. It can therefore be seen that both expressly and by implication the Commonwealth courts have recognised the commission merchant as a category of agent in the legal sense of the word, and have not used the term "agent" merely in a loose commercial sense. Such an interpretation does not fit into the technical context in which the dicta have occurred, and in particular Salmond J.'s judgment appears quite unambiguous.

Unfortunately, the English precedents have failed to follow the earlier authorities on the subject. In *Brown & Gracie* v. *F. W. Green & Co. Ltd.*,[49] the respondents who were mercantile agents in Australia, bought goods from an Australian manufacturer and resold to a British importer at the same price and on the same terms, charging commission to the importer for their services. Although on the facts this case might have been treated as falling within Salmond J.'s first category, that is a simple principal to principal relationship, or possibly within the second category, that of a commission merchant, Lord Denning in fact followed a different line of reasoning. He stated that the exporters were mercantile agents working on commission in "a familiar way of doing business which was fully considered in . . . *Ireland* v. *Livingston*." He considered that an agency relationship existed between Gracie and the importers, which, quoting *Ireland* v. *Livingston*, was transformed into that of vendor and purchaser, once the contract was made. Accordingly it was held that as the agent had acted reasonably in making a wrong interpretation of his authority, he was entitled to be fully indemnified for the damages he had paid to the suppliers, the importers having refused to pay on account of late shipment. Lord Denning did not fully make clear whether he considered the agency relationship to have terminated when the contract of sale

charges, and drew a 60-day bill on the plaintiff in Australia for the total, plus 8 per cent. commission, described in the invoice as a buying commission. The documents were then transmitted through a bank with the draft for acceptance.

[49] [1960] 1 Lloyd's Rep. 289, 308. It is unfortunate that with the various names already existing to describe such activities that the court should have chosen yet another, "mercantile agent," to describe procedures common a century ago. This proliferation of names makes it increasingly difficult to trace the true relationship of new case-law with existing precedents.

came into existence or whether it remained concurrently in existence with it. However, whichever interpretation is correct, rather than treat the question as a transformation of the agency relationship into that of vendor and purchaser as Lord Denning did, it would more logically fit into the second category of Salmond J.'s classification. In other words it is not necessary to treat the agency relationship between commission merchant and buyer as transformed into that of vendor and purchaser merely to explain the vesting of ownership in the buyer of the goods or to justify the exercise of a right of stoppage *in transitu*. Such a transformation does not reflect the commercial reality of the transaction, as the agency aspect does not in practice abruptly cease at such a point in trading relations.

The Foreign Principal Doctrine

How therefore have the courts approached the problems raised by such complex transactions when they have come before them? An answer is perhaps that although *Ireland* v. *Livingston* has been widely quoted as a precedent in various common law jurisdictions, the varying *rationes* have not been used uniformly as a precedent in commercial law. They have instead been utilised to support differing principles, and as a link for different series of precedents.[50] In particular, they have been used to support the doctrine of the foreign principal. This rule is a Victorian relic whereby an agent for a foreign buyer is presumed not to be authorised to pledge his foreign principal's credit, but instead accepts personal liability on any contract of sale he enters into with the home seller.[51] In other words, no privity of contract is created between buyer and seller. Such a doctrine has much to be said against it, as it is only a rebuttable presumption so that in any given circumstances there can be no certainty, without litigation, whether the presumption has been established or not. The law has therefore not attempted to classify the nature of a transaction and intermediary involved, to accommodate commercial requirements, but has provided a procedural solution in an endeavour to achieve the same result, an approach which can only create commercial uncertainty as to the actual result achieved. In particular, the courts have attempted to explain away various cases involving commission merchants or agents, and latterly confirming houses, by reference to this doctrine.[52] In so doing, they have missed the true nature of the commercial transaction involved, that is, the function of a commission merchant, and have misused the principles laid down in *Ireland* v. *Livingston*, further confusing this rather complex field of agency relationships.

[50] Apart from the foreign principal doctrine, it has been invoked *inter alia* in such differing precedents as *Brown & Gracie* v. *F. W. Green & Co. Ltd.* *Robinson* v. *Mollett*, and *Bolas'* case.

[51] A. H. Hudson, "Agents for Foreign Principals" (1966) 29 M.L.R. 353.

[52] See note 60.

By way of illustration of the failure of this approach to commercial law to further its development, it is of value to review briefly the conflicting precedents, both at home and abroad, which the doctrine has produced. For example, even in New Zealand itself, the courts have supported the rule that an agent cannot pledge a foreign principal's credit without evidence of express authority, applying the foreign principal presumption.[53] Moreover, in India the doctrine has been perpetuated by its incorporation into section 230 of the Indian Contract Act,[54] and extended to East Africa by ordinance. From the case-law though, there seems to have been some reluctance to apply the presumption. In the Kenyan case of *Alibhai Adamji* v. *A. Thomsen*,[55] there is an interesting digest of the case-law on the subject. Here section 230 applied, and the plaintiff argued that it was an irrebuttable presumption, but this was rejected by Webb J. on the grounds that it was not the effect of the Act as considered in two Indian cases referred to, where the agent was held not personally liable either.[56] To confuse the matter further, in one of the latter cases, the judge described it as a rebuttable presumption of law—"rebutted when the foreign principal himself is in writing made the contracting party and the contract is made directly in his name."[57] By contrast, Blackburn J. in *Armstrong* v. *Stokes*,[58] was of the opinion that it was a presumption of fact. Similarly in another East African case concerning indent agents, the court held that the presumption under section 230 (1) was rebutted.[59] The courts of Malaya however, although not subject to the Indian Contract Act, have recently both approved and rejected the foreign principal doctrine in a series of conflicting decisions.[60] On top of this one has the rejection of the doctrine

[53] *Tronhouse & Co.* v. *Official Assignee of Steads* (1896) 14 N.Z.L.R. 686.

[54] s. 230 provides that "in the absence of any contract to that effect an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them. Such a contract shall be presumed to exist in the following case(s):—(1) Where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad."

[55] 16 K.L.R. 10.

[56] *MacKinnon, Mackenzie & Co.* v. *Lang Moir & Co.* (1881) 5 Bomb. 584; *Tutika Basavaraja* v. *Parry* (1903) 27 Mad. 315.

[57] *Tutika Basavaraja* v. *Parry*, *ibid.* [58] L.R. 7 Q.B. 598, 605.

[59] *Parkar's Music & Sports House* v. *Motorex Ltd.* (1959) E.A. 584. Here there seemed to be some ambiguity in interpreting the Act in respect of an indent transaction, where the presumption was held to be rebutted. As Rudd J. said, "the presumption . . . only arises where the local agent can be said to have made the contract. That is to say where he has contracted himself *either as a principal or as agent*." This seems a contradiction in terms, as if he is contracting as a principal the presumption is superfluous. He adds that "where he makes a contract he is presumed to have done so as a principal and not as a mere agent unless the terms or the circumstances clearly show a contrary intention." This seems to take the matter no further as it still leaves the distinction between an agent personally liable under s. 230 (1) and an intermediary principal independent of the presumption, confused and undifferentiated.

[60] In *Toy Khong Hong* v. *Heap Mok Steamship Co. Ltd.* (1964) 30 M.L.J. 87, the judge stated that "I hold that when an agent contracts on behalf of a foreign principal, there is a presumption that he is incurring a personal

in a series of English cases commencing with *Miller Gibb* v. *Smith & Tyrer*.[61] Finally, in South Africa, which has developed much of its commercial law from common law sources, De Villiers [62] is of the opinion that with regard to English law, "The modern view is that there is no longer any such presumption." With regard to South African law itself, he suggests that

> "No South African case has authoritatively recognised any usage in this country corresponding to that which did, but probably does not now, exist in England; that a party seeking to rely on such usage must prove its existence and that in the absence of such proof there is no presumption that a foreign principal is not liable on a contract made by his agent in this country." [63]

Conclusions

From the conflicting state of the case-law considerable doubt must exist as to whether the foreign principal presumption in fact exists, its purpose and scope. Accordingly, to base commercial agency relationships upon such an unstable doctrine appears highly unsatisfactory.[64] However, as this article has attempted to prove,

liability unless a contrary intention appears. In doing so I am following the view expressed by Pearce J. in *Rusholme* v. *Read* [1955] 1 W.L.R. 150 and Scrutton L.J. in *Brandt* v. *Morris* [1917] 2 K.B. 784." In *Khemanico Textiles* v. *Gian Singh & Co.* (1963) 29 M.L.J. 360, on the other hand, Buttrose J. rejected the foreign principal argument and disapproved Pilcher J.'s support of the continued existence of the presumption in *Cox* v. *Sorrell* [1963] 1 Lloyd's Rep. 471. See also *Chow Kow Hin* v. *Wee Trading & Co.* (1957) 23 M.L.J. 84, where Spenser Wilkinson J. approved the doctrine quoting *Bowstead on Agency*, art. 116.

[61] [1917] 2 K.B. 141. See also *Maritime Stores* v. *H. P. Marshall* [1963] 1 Lloyd's Rep. 602, 607–608; *Holt & Moseley* v. *Cunningham* (1949) 83 Ll.L. Rep. 141, Pritchard J.; *Teheran-Europe Co. Ltd.* v. *S. T. Belton (Tractors) Ltd.* [1968] 2 Lloyd's Rep. 87, *contra*: *Cox* v. *Sorrell*, *ibid.*

[62] De Villiers and Macintosh, *Law of Agency in South Africa* p. 236. However, in *Preston & Dixon* v. *Bidens Trustee*, 1 Buch.A.C. 322, De Villiers C.J. treated it as a question of fact in each case, but seemingly assumed the presumption existed. In *Overseas Trust Corp. Ltd.* v. *Godfrey*, 1940 C.P.D. 177, p. 183, the court treated the intermediary as having a right of action because he was a principal, and not on the grounds of being an agent for a foreign principal. See also *Marais* v. *Perks*, 1964, 4 S.A. 802, 807. *Cf.* the points raised in note 59.

[63] *Ibid.* at p. 236. No such presumption is recognised by the *American Restatement*, Second, Agency, 1958, ss. 320 (d) and 328 (a).

[64] Stoljar, *Law of Agency*, p. 242, note 81, suggests that the confirming house or reliance upon the foreign principal has gradually replaced the foreign principal rule. He adds that the *del credere* agent guarantees the price to his own principal, the seller, whereas the confirmer does the reverse, and confirms payment to the third party, the seller, as he acts as the agent of the buyer. This however is rather an oversimplification as there exists in some trades, such as general produce brokers and the shellac trade, the practice whereby a broker undertakes to guarantee the solvency of both buyer and seller. In other words, there is what could be called a "double *del credere* agency." If such responsibility is accepted the broker will not reveal the identity of either party to the contract. Such a practice is not widespread though as it could put a considerable burden on the broker. Again, although a confirming house may act as the agent for the foreign buyer, it is not uncommon for him also to act as the agent of the British

an alternative exists in a logical series of *rationes* which offer a categorisation of commercial agency more akin to commercial reality, although largely neglected up till now. In other words, the doctrine of the foreign principal has been needlessly invoked where a more balanced *rationale* has been available. This has been due partly to a failure to appreciate that the common law has an obligation to provide a classification for commercial agents as does the civil law instead of attempting to fit unrelated categories into the general rules of agency without further analysis,[65] and thus refusing to accept that a similar concept to the contract of *commission* could exist at common law.[66]

Admittedly, the courts have recognised that an agent can be a principal himself either jointly or severally [67] with his principal but this still presupposes that privity has been created between principal and third party, irrespective of any additional responsibility the agent undertakes. There has however been a steadfast refusal to accept the principle that an agency relationship can exist with the normal rights and duties between principal and agent, even though the duties of the latter do not extend to creating privity between his principal and the third party, but only to bind him indirectly through the intermediacy of himself.[68] The precedents referred to do not demand that privity must invariably be created between principal and third party. Merely to dismiss such a relationship as being "agency" in a loose commercial sense and nothing more, does not accord with the decided cases. Equally, to "demote" an agent in such circumstances to the status of a principal demonstrates a failure to recognise the true nature of the commercial act in question, and it can pertinently be asked what purpose commercial law can have if it does not give formal recognition and sanction to the divers acts of commerce which are of regular and uniform occurrence.

It seems that the problem has partly stemmed from the failure

seller, in which case although he confirms the credit of the foreign buyer for whom he is acting, it may be doubtful whether in any particular case it should be treated as a question of confirmation or as a *del credere* guarantee. No case-law has occurred on this point, but it illustrates how commercial law and practice tend to go their separate ways. See "Del Credere" by Lord Chorley (1929) 45 L.Q.R. 221, where he discusses similar divergencies in the India trade. See also *The Export Trade* by C. M. Schmitthoff at p. 148 on confirming houses generally

[65] *e.g.*, the confirming house, forwarding agent and travel agent fall uneasily into either principal or agent status dependent upon the particular aspect of their operations in question—see "The Forwarder—Principal or Agent?" *Quarterly Journal of the Institute of Shipping and Forwarding Agents*, September 1966, D. J. Hill.

[66] *Brown & Gracie Ltd.* v. *F. W. Green & Co. Ltd.*, note 49.

[67] *Rusholme* v. *Read* [1955] 1 W.L.R. 146, 150 (n. 60, *supra*), Pearce J. and *Sobell Industries* v. *Cory Bros.* [1955] 2 Lloyd's Rep. 82, McNair J.—note 37.

[68] In other words commerce widely uses the concept of limited or imperfect representation, that is, rights and liabilities are vested in the representative himself on behalf of his principal instead of in the latter directly. Such a concept has not wittingly been acknowledged at common law.

to recognise that by relegating such relationships to the realms of legal presumption or commercial usage, an opportunity has been lost, since the latter half of the nineteenth century, to develop commercial law as a true mirror of economic reality. Such an approach is to be wondered at, bearing in mind that only a century earlier the judges were attempting to establish the supremacy of the common law by incorporating commercial custom and practice into the law. The common law must therefore struggle out of the strait-jacket in which it has pinioned itself in the field of agency, and realise that although agency law ceased to be dynamic a century ago, commerce has continued to grow steadily since then, and that no excuse exists for failure to recognise the fact.

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PASSING-OFF AND THE PROBLEM OF PRODUCT SIMULATION

THE tort of passing-off imposes liability upon a defendant who represents his goods or services in such a way that the intending purchaser is likely to mistake them for those of the plaintiff with whom the defendant is in competition.[1] The plaintiff must also prove that the features of his product, reproduced by the defendant in such a way as to induce confusion, have acquired a secondary meaning in that they have served to identify the goods as coming from a single source.

The term "secondary meaning" is normally applied to words which identify goods with a common source of origin. Thus, for example, in *Reddaway* v. *Banham*[2] the House of Lords held that the words "camel-hair belting," not only described the composition of the plaintiffs' product but also identified it; to the purchaser, "camel-hair belting" meant belting made by Reddaway. It is quite possible, however, that the product itself or features of it may also become exclusively associated in the mind of the purchaser with one manufacturer or distributor, so that on seeing the product the purchaser will assume that it comes from the same source as other products on the market of a similar appearance.

The problem to be discussed is the extent to which the general principles of passing-off apply to the simulation by the defendant of the plaintiff's product which is not protected by the patent or registered designs legislation but which has become exclusively associated in the mind of the purchaser with a single source.

It is not one of the purposes of this article to discuss the problems raised by the patent and registered designs legislation but to show that the courts have been prepared to grant protection under the tort of passing-off beyond the limits laid down by Parliament and that because the problems are rarely explicitly recognised the judgments often do not stand up to close scrutiny. The relevant issue is whether the existence of secondary meaning and the likelihood of confusion, with the possibility of economic loss to the trader and deception of the purchaser, justifies the courts in granting a monopoly falling within the ambit of but not protected by the patent and registered design statutes. In this legislation Parliament has attempted to strike a balance between the interest of the trader and the purchaser; thus, for example, the Registered Designs Act 1949

[1] *McCulloch* v. *Lewis A. May Ltd.* [1947] 2 All E.R. 845. See Street, *The Law of Torts*, pp. 377–381, for a discussion of liability where not all the requirements for passing-off are established.

[2] [1896] A.C. 199.

requires that, generally, only the author of the design may apply for registration,[3] that the design must be new and original [4] and that the statutory protection shall last for a maximum period of fifteen years.[5]

The leading textbooks on the law of torts analyse the different ways in which the tort of passing-off may be committed.[6] The most common of these are, the conduct of business by the defendant under a name confusingly similar to that of the plaintiff,[7] the marketing of a product bearing a name confusingly similar to that carried by the plaintiff's product, provided that that name, whether fanciful [8] or descriptive [9] has acquired a secondary meaning, and the use of what is compendiously called "get-up" in such a way that it is calculated to deceive the purchaser.[10] The relationship between the "get-up" of the goods and the features of the goods themselves has not been clearly defined and the difficulties that the courts have experienced in delineating the concept of "get-up" have a significant bearing on the analysis of the problem. The difficulties seem to arise in the following way: if the purpose of the tort is to give relief for economic loss caused or likely to be caused to a competitor through the deception of the purchaser by the defendant's circulation of goods with features which have served to identify the plaintiff's goods, then it is difficult to resist the reasoning that it is irrelevant in what way the plaintiff's goods are identified.[11] Thus if this were the only interest to be taken into consideration it should be irrelevant whether the confusing similarity is found in the use of the names of the businesses or the products, in the packaging and display, in elements of design of the product or in the totality of the product itself. But the courts have recognised that the protection given by the remedy for passing-off involves problems of monopoly and that these problems become more pressing as the produce simulation end of the scale is approached. The court's sensitivity on the scope of protection which they are prepared to give to the "get-up" of the plaintiff's product is explained by the fact that it falls between the protection which merely deprives competitors of the use of confusingly similar names where the dangers of monopoly are least obvious, and protection which prevents competitors from putting out an identical product where the dangers of monopoly are most obvious.

[3] ss. 1 (1), 2.
[4] s. 1 (2).
[5] s. 8.
[6] *Salmond*, 671–672; *Street*, 871–874; *Winfield*, 697–702.
[7] *Jay's Ltd.* v. *Jacobi* [1933] Ch. 411; *Parker-Knoll Ltd.* v. *Knoll International Ltd.* [1962] R.P.C. 265.
[8] *Powell* v. *Birmingham Vinegar Brewery Ltd.* [1897] A.C. 710.
[9] *Reddaway* v. *Banham* [1896] A.C. 199.
[10] *Edge* v. *Niccolls* [1911] A.C. 693.
[11] It is argued, for example, in Kerly's *Law of Trademarks and Tradenames* (9th ed.), para. 777 that " . . . It is not easy to see why misleading of the public by close imitation of goods should be any differently treated from misleading of the public in any other way."

Edge v. *Niccolls* [12] raises the problem of the relationship between the features of the goods themselves and their "get-up": the House of Lords granted an injunction preventing the defendants from simulating the "get-up" of the plaintiffs' product by selling bags of laundry blue with a stick inserted into the top of the bag unless they took steps sufficient to distinguish their goods from the plaintiffs'. Nowhere did their Lordships attempt to define the relationship between the goods and their "get-up," nor did they explain the function of this distinction. There are suggestions in the judgments that the "get-up" means the general appearance of the goods by which they are identified, although it is submitted that this is not supported by the weight of authority.[13] The House recognised that the stick had both a functional value in the use of the goods and served to identify them, and therefore was not prepared to enjoin the defendants absolutely from using sticks in their product. But if it were found as a fact that purchasers would think that any laundry blue with a stick came from a common source, then the effect of the judgment would be to give the plaintiffs a greater protection than they would have obtained if their patent had been held valid. For not only may the defendants enjoy the monopoly given by the remedy for the tort of passing-off indefinitely, *viz.* until the goods are no longer exclusively associated with a single source, but also they do not have to satisfy the requirements of novelty and usefulness set out in the Patents Act 1949.[14] In addition to imposing a competitive disability on the defendants as newcomers into the market, by giving protection to the plaintiffs in a design for which the patent had been revoked, the House of Lords recognised that they were imposing another fetter upon competition. Lord Robson admitted that, "the 'get-up' of the plaintiffs' bags was of such a simple and elementary character that it was perhaps the cheapest form possible, and any differentiation might possibly have involved some expense." [15] In his Lordship's view, however, differentiation was possible, "within reasonable and commercial limits," [16] although there is no indication as to the significance of this fact in the decision.

One of the difficulties involved in analysing this case is that the plaintiffs never made it clear in the lower courts whether they were seeking to restrain the defendants from using *any* stick in their

[12] [1911] A.C. 693.

[13] *J. B. Williams Co.* v. *H. Bronnley* (1909) 26 R.P.C. 765; *Jones* v. *Anglo-American Optical Co.* (1919) 29 R.P.C. 1. Two decisions at first instance by Kekewich J. provide some support for the view taken by the House of Lords in *Edge* v. *Niccolls*, *viz. Ripley* v. *Bandey* (1897) 14 R.P.C. 591; *Jones* v. *Hallworth* (1897) 14 R.P.C. 235. However, in *Terrapin Ltd.* v. *Ariston Buildings Ltd.* [1964] F.S.R. 218, Lord Denning M.R. affirmed the view of Fletcher Moulton L.J. in the *Williams* case that "get-up" meant something capriciously added that had no value in the use of the article.

[14] In particular, see s. 32 (1).

[15] [1911] A.C. at p. 709.

[16] *Ibid.*

laundry blue or from copying exactly *the* stick used by the plaintiffs. Thus the House of Lords accepted the disclaimer made by counsel for the plaintiffs that they were not endeavouring to restrain the defendants from putting up bag blue or tints with any stick in it but merely the exact copying of the plaintiffs' stick and bag which, since the revocation of their patent, had been exclusively associated with them. But the Court of Appeal [17] had concluded from the evidence that the plaintiffs based their claim on the presence of a stick attached to the bag and not a stick of any particular pattern.

It is submitted that this is only a partial explanation of the different results reached by the House of Lords and the Court of Appeal. For the more fundamental dispute turned on what was capable of being regarded as the "get-up" of the goods. As has been already observed, the judgments in the House of Lords do not provide any clear guidance for determining the line between the features of the goods and the "get-up." Probably the House of Lords regarded "the goods" simply as the contents of the bags, and the decision is authority for the proposition that a defendant may be restrained under the tort of passing-off from marketing a product in a container confusingly similar to that used by the plaintiff for his product, provided that the container has become exclusively associated with one source of origin, even though the form of this container may also have functional value in the use of the goods. This goes further than the later decisions in *John Haig Ltd.* v. *Forth Blending Co.*[18] and *Coca Cola Co.* v. *A. G. Barr & Co. Ltd.*[19] where it was not alleged that there was anything functional for the *use* of the product in the distinctive shape of the bottles. The shape of the bottles only served to identify the plaintiffs' products. The *Haig* case would have raised the same point as *Edge* v. *Niccolls* if it had been argued, for instance, that the shape of the bottles made it easier to pour the whisky. The judgments in *Edge* v. *Niccolls*, however, do not consistently maintain this distinction between the goods and their packaging. Thus Lord Gorrell said that "The real question is . . . whether the defendants' *goods* so resemble the plaintiffs' as to be calculated to deceive the persons who buy."[20] Lord Robson said, "The defendants evidently attached importance not only to the stick as a device for utility, but also to the *design of the article as a whole*, including the shape of the stick, and they copied it almost exactly. This was going too far."[21]

The Court of Appeal, especially Farwell L.J., took a different view of the relationship between "get-up" and the goods:

> ". . . That word [*i.e.*, "get-up"] implies something extraneous to the article, not the article itself—a handle is part of a

[17] [1911] 1 Ch. 5.
[18] (1953) 70 R.P.C. 259.
[19] [1961] R.P.C. 387.
[20] [1911] A.C. at p. 701.
[21] *Ibid.* p. 709. Italics supplied in these quotations.

basket, not the get-up of a basket. It is unnecessary to ascertain whether any fantastic shape of handle, serving a useful purpose could be part of the get-up of a basket: the handle in this case has nothing fantastic or distinctive about it." [22]

Although no reference was made in the House of Lords to a case decided only two years earlier in the Court of Appeal,[23] *obiter dicta* by Fletcher Moulton L.J. in that case, to the effect that nothing that had value in the use of the article could be regarded as part of the " get-up " of the article, no longer seems to represent the law.

Now, although *Edge* v. *Niccolls* may, however tenuously, purport to maintain the distinction between the goods and the wrappings, packaging and containers of the goods, thus avoiding the equation of the " get-up " of the goods with the general appearances and design of the goods themselves, it would appear that on the facts of the case this distinction is untenable. For the *rationale* for denying protection to the seller or distributor of an unpatented article from a competitor who puts out an identical product, even where that article has acquired a secondary meaning, is that it is against public policy to give to the first-comer in a field of business a monopoly in that article as a whole or in features that are related to the use of that article. Once a plaintiff claims protection in passing-off for something which falls within the ambit of patent and registered design legislation but for which he has failed to obtain the statutory protection, an element not normally present in passing-off cases must be taken into consideration.

The question is, therefore, whether the existence of secondary meaning is sufficient justification for subverting the policy contained in the legislation. Common law and equity have determined that the dangers of monopoly are outweighed by those of deception of the public when the competitor has put out a product which has wrappings confusingly similar to those used by the plaintiff for his product. This rule cannot simply be *applied* to the different situation when the allegation is that the product itself has been reproduced; the question is whether it should be *extended*, and this can only be answered by evaluating the competing elements of public policy. Generally, the packaging will have no functional value in relation to the use of the goods, although it may well be useful in the marketing of the goods; but in *Edge* v. *Niccolls* it was conceded by the House of Lords that the " get-up " of the goods did indeed have functional value, and yet the defendants were enjoined from using a confusingly

[22] [1911] Ch. at p. 14.

[23] *J. B. Williams Co.* v. *H. Bronnley* (1909) 26 R.P.C. 765. In the *Haig* case Lord Hill-Watson disapproved these dicta in *Williams*, preferring the statement in Kerly's *Law of Trademarks and Tradenames* (7th ed.) at p. 572 that, " any special design of a useful part of an article may form a part of the 'get-up.'" This statement does not appear in the current edition of Kerly where the dicta of Fletcher Moulton L.J. are preferred in a footnote at para. 777. See also *Terrapin Ltd.* v. *Ariston Buildings Ltd.* [1964] F.S.R. 218.

similar form of "get-up." Thus, if a plaintiff is able to restrain a competitor from putting out a product which has a confusingly similar "get-up" to that of the plaintiff's product, and this "get-up" has acquired a secondary meaning even though it has functional value in the use of the product, it would seem that relief should also be given when the features of which the plaintiff complains form part of the product itself. For the public policy in encouraging the free commercial availability of products that are not protected by statutory patent, and in denying protection to the original manufacturer against the competitor who imitates functional features of his products, must apply whether the features are said to be a part of the "get-up" or of the product. Therefore, it would be logically inconsistent to give protection to a functional feature of the "get-up" but not to a functional feature of the product itself. Thus the logical implication of *Edge* v. *Niccolls* is that the general principles of passing-off apply even to cases of product simulation.[24]

Thus *Edge* v. *Niccolls* appears to have answered the question posed earlier; the public's interest in the prevention of a monopoly in a product by the plaintiff is outweighed by the public's interest in the prevention of its own deception and "unfair competition." Arguably, therefore, the decision could open the way for a manufacturer, after establishing a secondary meaning for his goods, to secure a very favourable commercial position for himself. For the tort of passing-off does not require the two limitations of usefulness and novelty required by the patent legislation in return for the monopoly given by Parliament. Furthermore, the legislation limits the duration of time during which the monopoly is enjoyed and at the expiration of the patent, the patentee cannot allege that during the patent a secondary meaning became attached to the name of the product,[25] nor, *a fortiori*, to the article itself.

Cases prior and subsequent to *Edge* v. *Niccolls* indicate that the courts have not favoured this extension of passing-off, although in *Jones* v. *Hallworth*[26] an injunction was granted to restrain the

[24] It might be argued that the *Coca Cola* case presents difficulties for the critical analysis of *Edge* v. *Niccolls* here advanced. For although a bottle is both functional and may also serve to identify the product, it was assumed that the defendants would have been restrained from putting out a beverage of the same colour in a bottle of the same shape as that used by the plaintiffs. But this case is distinguishable from the fact situation in *Edge*. First, the plaintiffs' bottle was not of a basic design and the defendants would have incurred no extra cost in making a bottle of a different shape, whereas in *Edge*, the plaintiffs had adopted the simplest design for their porous bags and sticks and it was admitted that the defendants would have been put to extra cost to distinguish their product. Secondly, a bottle does not primarily have functional value in the use of its contents, although it makes marketing easier, and the fact that the plaintiffs' product came in a bottle was not a factor motivating the purchaser to buy the plaintiffs' product—if only because all such beverages were sold in bottles—except in so far as the distinctive shape serves to identify the product as the plaintiffs'.

[25] *Linoleum Manufacturing Co.* v. *Nairn* (1878) 7 Ch.D. 834.

[26] (1897) 14 R.P.C. 225.

defendants from manufacturing and supplying cut-pile dusters or polishing cloths which were likely to be confused with the plaintiffs'. Amongst the features which, to Kekewich J., seemed likely to cause confusion were the material used, the sizes and the colour of the cloth and the printing on it. In effect, he prevented the defendants from putting out a product which, as a whole, was similar to an unpatented product of the plaintiff, thus equating "get-up" with the appearance of the product itself.

The same plaintiffs were unsuccessful both at first instance [27] and in the Court of Appeal [28] where they sought a similar injunction to prevent a company from supplying polishing cloths for cleaning lenses, although the cloths used by the defendants were of the same material, colour and size as the plaintiffs'. The case could have been decided simply on the ground that the opticians to whom these cloths were supplied were not likely to mistake the defendants' product for the plaintiffs', but even assuming that a purchaser might think that the defendants' cloth came from the same source as the plaintiffs', Swinfen Eady J. concluded:

> "If I were to hold that the defendants had exceeded the limits of what they are entitled to do, the effect would be really to confer a monopoly on the plaintiffs in all fawn-coloured velveteen for the purpose of lens-polishers, because in substance what the defendants have done is that they have used buff-coloured velveteen for lens cleaners and that is very similar, in appearance, at all events, to the material of which the plaintiffs' lens polishers are made." [29]

The judgments in this case undermine the authority of *Jones* v. *Hallworth* by recognising that whilst the deception or the likelihood of deception of intending purchasers is always a necessary condition to a successful action for passing-off, it will not always be sufficient.

In another case [30] decided in the same year as *Jones* v. *Hallworth* Kekewich J. not only held that the defendants had infringed the plaintiffs' common law trade mark in the name "Oval Blue," but he also would have restrained the defendants from making blue in the same shape as the plaintiffs' if the plaintiffs had previously taken steps to prevent other competitors, who had made blue in the same shape, from doing so.[31] One of the obscuring features in this and many other passing-off cases, is the significance attached by the courts to the state of mind of the defendant. Although it is well

[27] *Jones* v. *Anglo-American Optical Co.* (1912) 29 R.P.C. 1.
[28] *Ibid.* at p. 381.
[29] *Ibid.* at p. 16.
[30] *Ripley* v. *Bondey* (1897) 14 R.P.C. 591.
[31] *Elliott* v. *Hodgson* (1902) 19 R.P.C. 518 provides some support for the view that a defendant may be restrained from putting out a product of the same shape as the plaintiff's when the shape identifies the product to the purchaser with a single source. Buckley J. held that in order to distinguish their flat-ended cigars from those of the same shape made by the plaintiff, it was not sufficient for the defendants to supply labels to be stuck onto plain boxes from which the cigars were sold in public houses.

established that the plaintiff may succeed without providing an intention by the defendant that his goods should be mistaken for those of the plaintiff,[23] the courts use the fraudulent intent of the defendant as evidence tending to prove that a secondary meaning did attach to imitated features of the plaintiff's goods. Moreover, where the defendant intended to deceive purchasers the courts are more ready to conclude that he was successful in his objective. But also from reading the judgments it is probable that a finding of fraud has a further and more pervasive, though less well defined effect, on the decisions, although no court has yet expressly stated that it is a function of the tort of passing-off to enforce the prevailing commercial ethical standards.

In the more recent cases the courts have not displayed a consistent attitude to the problem of the application of the principles of passing-off to the simulation by the defendant of the plaintiff's product which has been exclusively associated with a single source of origin. In *Hawkins and Tipson Ltd.* v. *Fludes Carpets Ltd.*[33] the plaintiffs were manufacturers of sisal matting on which they had used striking designs; the defendants made matting of an inferior material but had used the same design as the plaintiffs. In an action for passing-off an injunction was refused on the ground that the designs used by the plaintiffs had not become exclusively associated with them. Danckwerts J. however, went on to say:

> "It is not a question of get-up: it is a question of the appearance of the actual article that is sold. It seems to me that the rules which apply are not quite the same in a case of this kind as they are where some artificial covering to distinguish an article as being that of the manufacturers or sellers has been used, as opposed to where it is simply a question of the shape and appearance of the actual article which has been sold."[34]

His Lordship, unfortunately, did not give any guidance as to what rules *did* apply when it was "a question of the appearance of the actual article that has been sold." Nor did he explain exactly why he thought that *Elliott* v. *Hodgson* was "a very unusual case and one which would have to be regarded with a certain amount of care in applying it to other cases."[35] In *Universal Agencies Ltd.* v. *Paul Swolf*[36] Danckwerts J. refused an interlocutory injunction to the plaintiffs who alleged that the defendants had distributed a corkscrew confusingly similar in design to their own product which had acquired a secondary meaning. The decision was based on the

[23] *The Cellular Clothing Co.* v. *Maxton and Murray* [1899] A.C. 326; *Spalding* v. *A. W. Gamage Ltd.* (1915) 84 L.J.Ch. 449; *Draper* v. *Trist* [1939] 3 All E.R. 513. There are, however, dicta, *e.g.*, in *Draper*, that substantial damages will be awarded only on proof of fraud. See on this and other points, Morison, 2 Sydney L.R. 50.

[33] [1957] R.P.C. 8.

[34] *Ibid.* at p. 11.

[35] *Ibid.*

[36] [1959] R.P.C. 247.

plaintiffs' failure to prove likelihood of confusion but Danckwerts J. again considered that the plaintiffs were, anyway, not entitled to claim a monopoly in the shape of their corkscrew. His Lordship also said that the particular shape of the product was of no functional value although it had probably contributed to its commercial success. The significance of this latter statement will be considered later. It is not difficult to appreciate why Danckwerts J. felt uneasy about applying the general principles of passing-off to the more obvious attempts to evade the limitations laid down by the design and patent legislation, but it is submitted that *Jones* v. *Hallworth*, *Elliott* v. *Hodgson* and the implications of *Edge* v. *Niccolls* must be handled more boldly. Problems that raise such complex and conflicting issues of policy cannot be dealt with merely by oblique references to the relevant authorities.

In *British-American Glass Ltd.* v. *Winston Products*[37] Pennycuick J. declined to grant an interlocutory injunction to restrain the defendants from passing-off their products as those of the plaintiffs on the ground that the plaintiffs had failed to discharge their onus of proving that secondary meaning attached to their trinkets which were made in the shape of a dog. Although Pennycuick J. stated that the defendants had not imitated the "get-up" of the plaintiffs' articles, but the article itself—thus avoiding the equation of the "get-up" with the general appearance of the actual goods sold—he did not suggest that they provided any reason for denying the plaintiffs' motion if they satisfied the requirements of the tort in other respects. But the judgment does contain a sentence which may prove to be significant, for his Lordship gave as the reason for holding that the plaintiffs' product had not acquired secondary meaning that, "a member of the public buying an ornamental trinket of this nature is concerned only with what it looks like and is unlikely to care where it is made."[38] This may be interpreted in two ways. First, Pennycuick J. may simply have been using the fact that these dogs were all identical and cheap as evidence of the fact that the plaintiffs had failed to prove that a secondary meaning attached to their goods. Secondly, he may have meant that in this type of case the plaintiff must prove not only that the purchaser associated the product with a single source but also that this was a motivating factor in the decision to buy. The latter interpretation of Pennycuick J.'s words, echoes those of Learned Hand J. in *Crescent Tool Co.* v. *Kilborn and Bishop*,[39] where he said, "... it is an absolute condition of any relief whatever that plaintiff in such cases show that the appearance of his wares has in fact come

[37] [1962] R.P.C. 230. If the case had been decided the other way it is difficult to see how the defendants could have distinguished their products from the plaintiffs' without abandoning the design altogether, for neither party sold their product in any wrapping nor were their names used in the display.

[38] *Ibid.* at p. 232.

[39] 247 F. 299.

to mean that some particular person makes them, *and that the public cares who does make them and not merely for their appearance and structure.*"[40] The introduction of this requirement of source motivation as well as source association into the law would, of course, increase the burden of proof on the plaintiff and make the acquisition of monopoly in unpatented articles more difficult, although it would also make the prediction of the court's decision even more difficult.

The most recent decision[41] in which this problem was raised turned on a finding of fact that there was no likelihood of confusion between the parties' goods because the sources of origin of the goods were clearly displayed on their labels. The plaintiff had sought an interlocutory injunction to prevent the defendants from putting out greeting cards bearing a striking resemblance to those designed by an artist who worked under contract exclusively for the plaintiffs. Buckley J. went on to say:

> "I feel that there is force in the submission . . . that to constitute passing-off at all the feature which is relied upon as being that which persuades somebody to buy the goods under the belief that they are the goods of the plaintiff, although, they are, in fact, the goods of the defendant, must be of a sufficiently defined character, and merely to assert that goods . . . are passed-off by one party as being the goods of the other party because of a similarity of artistic style, or even a similarity of content and design, which does not or may not amount to a breach of copyright would be too indefinite a feature to rely upon as the basis of granting relief in respect of passing-off."[42]

Although this passage speaks in terms of "indefiniteness" rather than attempting to distinguish between features of the goods and the "get-up" or between functional and non-functional features of the goods, it does illustrate the doubts that have been expressed by the courts in determining whether the general principles of passing-off should be extended to cover cases of product simulation.

By way of contrast, Cross J. in *New Way Packaged Products Ltd.* v. *Lucking Ltd.*[43] granted an interlocutory injunction restraining the defendants from the use of packaging similar to that used by the plaintiffs after the plaintiffs had given evidence that their packaging was original and distinctive. Cross J. did not appear to require that the plaintiffs should prove an exclusive association of the packaging of the goods. This case has little bearing on the immediate problem under discussion since the question of whether the packaging had any functional value in the use of the goods was not raised; but it may be that just as dicta in *Hawkins and Tipson Ltd.*, *Universal Agencies Ltd.*, *British-American Glass Ltd.*, and *Fraser*

[40] *Ibid.* at p. 800. Italics supplied.
[41] *Gordon Fraser Galleries Ltd.* v. *Tatt* [1966] R.P.C. 505.
[42] *Ibid.* at p. 509.
[43] [1960] R.P.C. 147.

Galleries Ltd. indicate that the courts may not grant relief when the plaintiff's grievance is that features of the goods have been copied merely on the proof that they have acquired an exclusive association with the plaintiff,[44] so may the courts be less stringent in requiring proof of secondary meaning when the defendant has copied the packaging which has no functional value to the use of the plaintiff's product. The brevity of the judgment in *New Way Packaged Products Ltd.* must make this latter proposition very tentative and it is submitted that it would constitute a development both undesirable and unsupported by precedent.

It may be instructive to draw on the experience that the courts in the United States have had in dealing with the application of the principles of passing-off to the simulation of a product or features of the product. Two recent decisions in the United States Supreme Court[45] have rendered much of the learning in the older cases otiose, but it is still instructive for the English lawyer to examine the doctrines that had been evolved by the courts in an attempt to strike a balance between, on the one hand, the promotion of inventiveness and the protection of the public from deception, and, on the other, free competition. Two of the most important tools used by the courts to effect this purpose were the distinction between functional and non-functional features of the goods and the requirement in this type of passing-off of source motivation as well as source association. Difficulties arise when the plaintiff claims that the feature that appears on the defendant's product is used by the purchaser to identify the plaintiff's product, but the defendant argues that the feature also has a functional value in the use of the product. Once outside the realm of verbal (and perhaps pictorial) symbols, the courts are faced with the difficult task of defining the limits of the concept of functionality. The reason for drawing this distinction is to avoid establishing, outside the limits of the patent and registered designs legislation, a monopoly in a product for which there is a public demand or in a feature of that product which serves both to identify that product and contributes to the demand for it. When the disputed feature of the goods facilitates the use of the article contemplated by the plaintiff, it is easy to describe it as functional. This was made clear, for example, in *Marvel Co.* v. *Pearl*,[46] where Townsend J. said that, "in the absence of protection

[44] In a very short judgment in *Blundell* v. *Sidney Margolis Ltd.* (1951) 68 R.P.C. 71, Harman J. refused the plaintiffs an interlocutory injunction to prevent the defendants from passing-off their "bubble-gum" as that of the plaintiffs' by making it in the shape of false teeth. The case was decided on the ground that the plaintiffs had failed to show that this shape had become exclusively associated with them; Harman J. did not indicate whether the plaintiffs would have succeeded if they had proved this.

[45] *Sears, Roebuck* v. *Stiffel Co.* 376 U.S. 225 (1964); *Compco Corpn.* v. *Day-Brite Lighting Co.* 376 U.S. 234 (1964). For a stimulating discussion of these cases, see 64 Columbia L.R. 1216 (1964).

[46] 139 F. 160.

by patent no person can monopolise elements of mechanical construction which are essential to the practical operation of a manufacture, or which primarily serve to promote its efficiency for the purpose to which it is devoted." [47] But as Learned Hand J. observed in *Champion Spark Plug Co.* v. *A. R. Mosler and Co.*,[48] "It is only when the mechanical operativeness of the thing is materially all that determines the buyer's choice that such a criterion is safe." [49] The implications of these dicta make possible an extremely flexible concept of functionality which can cover not only articles which are bought primarily for their aesthetic qualities, but also where such qualities materially influence the decision of the purchaser.[50]

The reasoning of the Supreme Court in the *Sears, Roebuck* and *Compco* cases was that since the United States Constitution had empowered the Congress to pass patent and copyright legislation [51] and the Congress had exercised that power, then any state law—even if evolved from a power given to the states—which was incompatible with the policy of the federal statute was invalid.[52] In both cases *certiorari* was granted and the court stated that despite the defendant's knowledge of the likelihood of confusion, the existence of secondary meaning, the absence of functionality and the possibility of consumer confusion, the defendants could not be restrained from copying an article which was not protected either by copyright or patent. The court did say, however, that states could require that the defendants should take other measures to prevent confusion, *e.g.*, by the use of distinctive labels and packaging.

One of the problems involved in the extension of the tort of passing-off to cases of product simulation is in determining the scope of the injunction to be granted. Normally, the defendant will not be enjoined absolutely from using the disputed feature, but conditionally, upon his distinguishing his goods in other ways. In many cases the result is, in effect, that the defendant is enjoined absolutely from using the disputed features, but in other cases the steps held by the courts to be sufficient to distinguish the products often undermine the original decision to impose liability. For the courts often attach much less importance to the disputed features as means of identification at this stage of the proceedings than they

[47] *Ibid.* at p. 161.
[48] 238 F. 112.
[49] *Ibid.* at p. 116.
[50] Thus, for example, in *J. C. Penney Co.* v. *Lee Mercantile Co.*, 190 F. 2d. 949 at p. 954 Johnson J. defined functionality as any element in the goods which, "materially contributed to their commercial success."
[51] Article I: "The Congress shall have power . . . To promote the Purpose of Science and useful Arts, by securing for limited Time to Authors and Inventors the exclusive Right to the respective Writings and Discoveries."
[52] Amendment VI: "This Constitution and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

did in the reasoning of the judgment that originally led to the granting of the injunction. Thus in *Edge* v. *Niccolls*, the House of Lords held that because the purchasers of penny bags of laundry blue were likely to be "washerwomen, cottagers, and other persons in humble station of life,"[53] the defendants had not sufficiently distinguished their goods by placing their name in large letters on the bags. The House reasoned that since the plaintiffs had not put their name on their product, purchasers might suppose that this was the name of manufacturers of the original "blue with the stick in it." It is arguably unfair to force the newcomer in the market to distinguish his goods by making more fundamental changes to his merchandise than he would have had to if the plaintiff had identified himself on his product. Their Lordships suggested that the defendants could avoid confusion by using a stick of a different colour, shape or material, but whether this would provide sufficient distinction for the particular class of purchasers contemplated in the judgment is surely open to doubt. Presumably, the plaintiffs, after failing in the Court of Appeal, lost their nerve and abandoned their claim for protection from the use by the defendants of any stick in their laundry blue, although it was surely precisely this by which their product was identified. Thus if the general principles of passing-off are applied to the simulation of features of the product itself the courts must surely often find themselves in the dilemma of either forbidding the reproduction of the features altogether or of allowing them, provided that the goods are distinguished in other ways (*e.g.*, by packaging or display) although the reason why the injunction had been granted was because the disputed features were the principal means by which the plaintiff's goods were identified.

The English cases that have been considered tend to formulate the critical distinction as being that between the goods and their "get-up." But the reason for distinguishing between the goods and the "get-up" is the same as that for distinguishing between the functional and non-functional features of the goods. Both are attempts to prevent the withdrawal from the public domain of a feature of a product which itself motivates the purchaser to buy and does not depend for its commercial value solely on the fact that it identifies the product. *Edge* v. *Niccolls* is an unsatisfactory decision because by enjoining the defendant from reproducing a feature having value for the use of the plaintiff's goods, it obscures the *rationale* of the distinction between the goods and their "get-up."

This review of the authorities has shown that in the more recent English cases the judges have been reluctant to extend the tort of passing-off where the features for which the plaintiff has sought protection have not only served to identify his product but also have an independent value in furthering the commercial success of his product. But it is impossible to construct from the authorities any

[53] [1911] A.C. at p. 704.

coherent principle. It is submitted that the tort should be confined to features which only serve to identify and that the existence of secondary meaning does not justify the courts in extending the protection given by Parliament. If a businessman is concerned that his product should be distinguishable from his competitors', the most effective way of accomplishing this is by the production of a cheaper or superior article. In an age of mass-production, the decline of substantive distinctions between products and the development of advertising techniques which do not primarily emphasise the intrinsic merits of products, the fundamental assumptions of passing-off may need re-examination.

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THE VALIDATION OF VOID MARRIAGES

A LAWYER instinctively repels the idea of validation of a void marriage and his first reaction would probably be to echo the American view that "ratification of nothing is unthinkable and impossible." [1] In the words of Lord O'Brien C.J.[2]: "As was asked with much emphasis by counsel during the argument, how could the marriage be validated if it was altogether void? Such a proposition, it was contended, finds no support from 'reason'." To this contention Lord O'Brien replied [3]: "I am afraid that there are many things lying at the root, at the foundation, of the Christian religion, mysteries of faith, for an elucidation of which we should appeal to 'reason' in vain. The incredulity of scepticism is caused by making 'reason' the sole and exclusive touchstone of faith."

In truth, our law of marriage is, subject to statutory modifications and additions, the canon law of the Church of England as administered by the Ecclesiastical Courts [3] prior to the Matrimonial Causes Act 1857, and marriage, which was a sacrament until the Reformation,[4] finds its roots reaching deep into the mysteries of the Christian faith. One such mystery was the doctrine of the ratification of a void marriage. It was a doctrine of the canon law [5] of the Roman Catholic Church, which was adopted by English ecclesiastical law, that a marriage void on the ground that there was no consent at the time of its celebration could be ratified by a consent voluntarily given subsequently, whereupon the void marriage became valid. The absence of consent could result either from a party's inability to consent because of his unsoundness of mind or from being temporarily deprived of his freedom of choice by fear, duress or other circumstances, such as a mistake as to the identity of the other spouse or as to the nature of the ceremony. In the former case the void marriage could be ratified during a lucid interval or when sanity returned [6] and, in the latter case, when the

[1] *Wiley* v. *Wiley* (1919) 123 N.E. 282, 285.
[2] *Ussher* v. *Ussher* [1913] 2 I.R. 455, 490.
[3] *R.* v. *Millis* (1844) 10 Cl. & Fin. 534, 614, 657, 678, 680, 875.
[4] Marriage ceased to be a sacrament by Article 25 of the Thirty-nine Articles; *Fender* v. *Mildmay* [1938] A.C. 1, 27.
[5] Decretals of Pope Gregory IX, 1227, Bk. IV, tit. 7, ch. 2. The present canon law of the Roman Catholic Church continues to allow the validation of marriages void for lack of consent and of certain other void marriages: *Codex Juris Canonici*, canons 1133–1137; *Canon Law* by Bouscaren and Ellis (1946), pp. 568–578.
[6] *Mrs. Ash's Case* (1702) Freeman C.C. 259. "A lunatic during his lunacy is not capable of marriage, but in lucid intervals he may; and if such a marriage should be had during the lunacy, the civilians held, that by subsequent consent it may be made good, as the marriage of an infant before the age of discretion may be made good by a subsequent assent": Shelford's *Marriage and Divorce* (1841), p. 197; see also *Ellis* v. *Bowman* (1851) 17 L.T.(o.s.) 10.

duress or other circumstance precluding free consent was removed. Thus, Ayliffe writing in 1726 states the law to be as follows [7]:

> "Matrimony contracted through any menace or impression of fear is null and void *ipso jure*, so that it is not necessary to rescind the same by an action, in the Civil and Canon Law called *Quod metus causa*, because all marriages ought to be free. . . . But though matrimony contracted through such a fear as may happen to a man of courage, constancy and resolution be null and void *ipso jure*; yet this fear may be purged and done away by a spontaneous cohabitation for so long a time as that the cause of such fear may be presumed to cease and be destroyed thereby and a spontaneous consent added in its room."

Swinburne,[8] writing forty years earlier, said with reference to the marriage of children:

> "Albeit either of the parties, during their minority were constrained by fear to marry (by reason whereof the same was utterly void), yet by cohabitation after years of consent, this fear is purged and the marriage confirmed."

Poynter[9] in 1824, Roger[10] in 1840 and Shelford[11] in 1841 all express the rule of law to be as stated by Ayliffe, so that on the eve of the passing of the Matrimonial Causes Act 1857, which introduced divorce and transferred the jurisdiction of the ecclesiastical courts in matrimonial matters to the newly created "Court for Divorce and Matrimonial Causes," there was a consensus of legal opinion as to the law of ratification of a marriage void for absence of consent. By section 22 of the 1857 Act the new civil Divorce Court had in suits other than divorce to "proceed and act and give relief on principles and rules which in the opinion of the said court shall be as nearly as may be conformable to the principles and rules on which the ecclesiastical courts have heretofore acted and given relief." Section 22 was repealed by the Supreme Court of Judicature (Consolidation) Act 1925, and sections 21 and 32 of this Act took the place of the repealed section 22, the effect of both section 22 of the 1857 Act [12]

[7] *Parergon Juris Canonici*, 1726, p. 361. [8] *Treatise of Espousals* (1686), p. 38.
[9] *Doctrine and Practice of the Ecclesiastical Court* (1824), p. 188.
[10] *Ecclesiastical Law* (1840), p. 564.
[11] *Law of Marriage and Divorce* (1841), p. 214.
[12] *Templeton* v. *Tyree* (1872) 2 P. & D. 420 at p. 423 ("This Court has no power except such as was given it by the Matrimonial Causes Act 1857, and the power so given was that exercised in similar cases in the Ecclesiastical Courts"): *Andrews* v. *Ross* (1888) 14 P.D. 15, 16, 17 ("By s. 22 of the Matrimonial Causes Act 1857 it is provided that in all suits and proceedings other than proceedings to dissolve any marriage, the court shall proceed to act and give relief on principles and rules on which the Ecclesiastical Courts have heretofore acted. By them I am bound"); *Moss* v. *Moss* [1897] P. 263, 270 ("The principles of the Ecclesiastical Courts which in nullity cases, are the guide of the tribunals"): *Napier* v. *Napier* [1915] P. 184 (C.A.), 188, 191 ("By s. 22 it is provided that in all suits except those of dissolution of marriage (including therefore suits for nullity) relief shall be given on the principles prevailing in the Ecclesiastical Courts. . . . The grounds of nullity are limited by the Act just as strictly as the grounds of dissolution;

and of the sections of the 1925 Act [13] being to perpetuate the law of nullity of marriage as it stood before the 1857 Act, subject of course to subsequent statutory modifications and judicial development. Thus, the law of ratification of a void marriage, a part of the law of marriage and nullity of marriage, passed into the law administered by the new Divorce Court, as was indeed acknowledged in *Valier* v. *Valier*,[14] where the petitioner thought the marriage to be a betrothal ceremony; Lord Merrivale P. found the marriage to be void on the ground that there was no consent because the petitioner was mistaken as to the nature of the ceremony, and he added [15]:

> "I must consider whether there has been anything in the petitioner's subsequent conduct which amounted to a ratification. The case would be a very different case if, after the petitioner realised that a marriage ceremony had been performed, the parties had proceeded to take each other as man and wife . . . there has been no such understanding or consent by the petitioner to accept the responsibilities of the respondent's husband as would make the ceremony binding on him."

So much, then, for validation of a void marriage by subsequent ratification. But there is another form of validation of a void marriage which a lawyer, accustomed to thinking along the lines of legal principles, will find more palatable—validation by legislation. There are numerous Acts of Parliament [16] passed in order to make valid marriages celebrated in good faith but which turned out to be invalid as a result of some defect in formalities; some of the Acts dealt with marriages celebrated in England or Ireland and others with marriages in the colonies and abroad. Perhaps the most curious

but instead of being set out in the Act they have to be sought in the principles adopted in the Ecclesiastical Courts. . . . I do not think it was in the power of the Court to alter the law; such alteration must be made if at all by the legislature which has established the law").

[13] *Baxter* v. *Baxter* [1948] A.C. 274, 285 ("The same jurisdiction [*i.e.*, the jurisdiction under s. 22 of the 1857 Act] is inherited by the High Court and the Court of Appeal respectively by virtue of the provisions of s. 32 of the Supreme Court of Judicature (Consolidation) Act 1925"); *Matalon* v. *Matalon* [1952] P. 233, 237 C.A. ("That [*i.e.*, the jurisdiction under s. 32 of the 1925 Act], it is conceded, throws the court back to the practice and jurisdiction of the Ecclesiastical Courts").

[14] (1926) 138 L.T. 880. There does not appear to be any other English case on ratification of marriages void for want of consent. When Phillimore J. in *Hayward* v. *Hayward* [1951] P. 152 said at p. 158: "It seems to me that it would be contrary to all principle if a ceremony, which is by definition null and void, could be converted into something valid and binding and capable of conferring status by the act or inaction of a party to it. It would surely be remarkable as a proposition of law if this court were to be prevented from declaring the truth, namely, that a marriage is bigamous and so correcting the status of parties to it and of their dependants merely because one of them had failed to dispute or had concurred in the assertion of its validity by the other," he had before him a marriage void for bigamy to which the doctrine of ratification has no application.

[15] *Ibid.* at p. 882.

[16] See the examples given in *Rayden on Divorce*, 10th ed., p. 190; in *Starkowski* v. *Att.-Gen.* [1954] A.C. 155 over 50 such statutes, passed between 1780 and 1989, were cited to the court: *ibid.* at p. 174.

Act was the Irish Marriage Act 1785,[17] which provided that a marriage of any person under twenty-one without the written consent of the father or guardian (or, if none, of the Lord Chancellor or the Lord Keeper of the Great Seal) was "null and void" unless the father or guardian brought a suit for nullity within one year of marriage, but, failing such action on his part, the marriage at the end of the year became "good and valid." This Act was aimed exclusively at the rich whose infant children were presumably prone to enter into unwelcome marriages, for the Act only applied in the case of infants who had real estate of the value of £100 per annum or personal estate of the value of £500 or who had a parent with real estate of the value of £100 per annum or personal estate of the value of £2,000; moreover, the penalties were made to fit the crime and any person of full age marrying an infant falling within the provisions of the Act, was to be imprisoned for one year and was to forfeit £500 if his estate was worth £10,000 or more and £200 if his estate was worth less than that sum, half the amount forfeited being payable to the common informer successfully "suing for the same."

The formalities of marriage being governed by the *lex loci contractus*, it was held in *Starkowski* v. *Att.-Gen.*[18] that English law recognises as valid an enactment by a foreign state's legislature validating a marriage taking place on the territory of that foreign state and which was invalid for want of formalities; thus, where a marriage in Austria was void for lack of formalities and a later Austrian law provided that the marriage, upon it being registered in the appropriate book at the register office, would be validated *ab initio*, the marriage was held to be valid once it had been registered, irrespective of domicile or nationality of the spouses, and a subsequent marriage in England by one of them was void for bigamy. Conversely, where, in the case of a similar German law, the void marriage was never registered, the marriage remained void and the subsequent marriage by one of the spouses to a third person was, therefore, valid.[19]

This, then, is the position: first, a marriage void for absence of consent, whether by reason of unsoundness of mind or by reason of extraneous circumstances, can be validated by the requisite consent supervening at a date subsequent to the marriage itself; secondly, Parliament has from time to time validated marriages void for lack of formalities; thirdly, foreign marriages void for lack of formalities can be validated by subsequent legislation of the *lex loci contractus*. This gives rise to two interesting questions: what is the matrimonial status of the parties between the date of the void marriage and the date of foreign retrospective validation if, before validation of the parties' marriage one of them marries a third person, and does this

[17] An Act of the Irish Parliament: 9 Geo. 2, c. 11.
[18] [1952] P. 135; [1952] P. 309 (C.A.); [1954] A.C. 155.
[19] *Pilinski* v. *Pilinska* [1955] 1 W.L.R. 329.

second marriage, which is undoubtedly valid at the time of the celebration, become null and void upon the first marriage being validated? This is the very question expressly left open in *Starkowski* v. *Att.-Gen.*[20] where it was contended that English law should not recognise foreign legislation retrospectively validating a void marriage because (it was argued) if, before the marriage was validated and while it was still void, a party to it married a third person, this second marriage, which was unquestionably valid at the time when it was contracted, would be made void by the subsequent validation of the first marriage. The judges of all three courts pointed out that this was not the situation in the case before them, the first marriage having been validated before the second marriage had taken place, and they all[21] refused to commit themselves as to what would have been the status of the second marriage if it had taken place before the legislation validating the first marriage. Nevertheless, it may be permissible to try to gain a hint as to what the solution might be by examining the judgments.

The first hint came from Barnard J. and the Court of Appeal. Barnard J., referring to a probate case[22] where there was foreign retrospective legislation and where it had been held that the relevant foreign law to be considered was that which was actually in force at the time of the deceased's death and not that which was deemed to have been in force by virtue of subsequent retrospective legislation, said[23]:

> "The relevant time to consider the foreign law was at the time of death, but in the present case the relevant time is when the second ceremony of marriage took place. This case would have been a strong authority for the petitioner if the second ceremony of marriage had preceded the registration of the first ceremony of marriage. . . . I have come to the conclusion that I must ask myself one simple question: were both parties free to marry on February 11, 1950?"[24]

The Court of Appeal appeared to be accepting this view[25]:

> "As Barnard J. said . . . the relevant date here is when the second ceremony took place."

And likewise Lord Cohen[26]:

> "My Lords, the question for your decision was correctly and succinctly stated by Barnard J. as follows: Were both parties (to the marriage celebrated in Croydon) free to marry on February 11, 1950?"[24]

So far, so good. If, as would appear from these quotations, the

[20] [1952] P. 135.
[21] [1952] P. 135, *per* Barnard J. at p. 145; [1952] P. 302, *per* C.A. at p. 307; [1954] A.C. 155, *per* Lord Morton at p. 168; *per* Lord Reid at p. 172; *per* Lord Tucker at p. 176; *per* Lord Asquith at p. 177; *per* Lord Cohen at pp. 179, 182.
[22] *Lynch* v. *Provisional Government of Paraguay* (1871) 2 P. & D. 268.
[23] [1952] P. 135, 144, 147.
[24] The date of the second marriage.
[25] [1952] P. 302, 305.
[26] [1954] A.C. 155, 178.

validity or invalidity of the second marriage is to be determined by reference to the *lex loci* actually in force at the time of the second marriage, the second marriage would be bigamous and void if it took place after the first marriage had been validated (as happened in *Starkowski* v. *Att.-Gen.*[27]), but the second marriage would be valid if it took place before the first marriage had been validated, that is to say, at a time when the parties to the second marriage were both free to marry. Unfortunately, there are other dicta which suggest a different conclusion. Thus, Barnard J. himself, referring with approval to a Canadian case[28] which acted on retrospective legislation, said:

> "I gather that the Chief Justice is saying that at whatever time you have to consider the validity of a ceremony of marriage that is the time to ascertain the *lex loci celebrationis*."

And Lord Reid said[29]:

> "In my opinion the balance of justice and convenience is clearly in favour of recognising the validity of such retrospective legislation (subject, it may be, to some exceptions) and the objections to doing so are not substantial and are not founded on any compelling principle. Once it is settled that the formal validity of a marriage is to be determined by reference to the law of the place of celebration, there is no compelling reason why the reference should not be to that law as it is when the question arises for decision."

Now, at the time of the second ceremony of marriage and at the time when the question of the formal validity of the first marriage arises for decision, the *lex loci celebrationis* may not be the same. It was the same in *Starkowski* v. *Att.-Gen.* because there the second marriage and the occasion when the formal validity of the first marriage arose for decision were both subsequent to the legislation which retrospectively validated the first marriage. But if the second marriage comes first and the legislation retrospectively validating the first marriage comes later, and later still the question of the validity of the first marriage arises for decision, then the *lex loci* at the time of the second marriage and at the time when the question arises for decision will be quite different: if the time of the second marriage is the relevant time for ascertaining the *lex loci*, then the second marriage will be valid, for at the time of its celebration, the first marriage is still void and has not been validated; if the relevant time is when the question subsequently arises for decision, by which time retrospective legislation is in force and has validated the first marriage, then the second marriage will be invalid. Perhaps it is rash to conjecture and wiser to agree respectfully with the Court of Appeal[30] that the question "had better be left to be dealt with if and when it arises."

D. TOLSTOY.*

[27] [1952] P. 135.
[28] *Doe d. Breaky* v. *Breaky* (1846) Upper Can.Rep. 2 Q.B. 349.
[29] [1954] A.C. 155, 172. [30] [1952] P. 302, 307.

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STATUTES

Trade Descriptions Act 1968

This Act repeals and consolidates the Merchandise Marks Acts 1887–1953 and at the same time makes many important changes in the law. Some of these are based on the recommendations of the Molony Committee,[1] but in several important respects the Act goes beyond those recommendations.

Section 1 restates the principal offences—those of, in the course of a trade or business,[2] (a) applying a false trade description to goods and (b) supplying or offering[3] to supply goods to which a false trade description has been applied. The separate offence of forging a trade mark[4] is not re-enacted, but in most other respects the Act extends the scope of the criminal law as to trade descriptions and similar statements. The most important changes are as follows.

(1) The definition of "trade description" is very considerably extended. It occupies ten paragraphs in section 2 (1), the fifth of which reads: "any physical characteristics not included in the preceding paragraphs." This is followed by two subsections of explanation and two of qualification; and in case anything has been left out it is further provided[5] that "Anything . . . likely to be taken for an indication" of any of the matters specified in the principal definition which, "as such an indication, would be false . . . shall be deemed to be a false trade description." Statements which fall outside these provisions may still be caught under later sections[6] or other Acts.[7] But there is no liability under these provisions for statements which are clearly statements of opinion or trade puffs.

(2) By section 4 (2) "An oral statement may amount to the use of a trade description." It remains to be seen whether the anticipated difficulties of enforcing this provision (which led the Molony Committee to favour retention of the contrary rule)[8] will materialise.

(3) The Act makes new provision for the application of the law as to false trade descriptions to statements in advertisements. By section 5, any person who publishes an advertisement containing a false trade description in relation to "any class of goods" may be

[1] In Part V of its Final Report, Cmnd. 1781 (1962).
[2] Thus private sales are exempt. Editorial comment is also exempt by s. 39 (2).
[3] Defined, to avoid a well-known trap, to include exposing and having in possession for supply: s. 6.
[4] See Merchandise Marks Act 1887, s. 1 (1).
[5] In s. 3 (3).
[6] *e.g.*, ss. 11, 12 and 18.
[7] *e.g.*, those referred to in s. 2 (4) and (5) and the Weights and Measures Act 1963.
[8] Cmnd. 1781, paras. 658–660; *cf.* H.L.Deb., Vol. 286, col. 644.

convicted of applying the trade description "to all goods of the class"; and any person who supplies or offers to supply goods of the class *and* publishes or displays the advertisement may be convicted of supplying, etc., goods to which a false trade description has been applied: the effect of this is that a shopkeeper is only liable under section 5 if he himself publishes or displays the advertisement. The section may impose liability on the advertiser, the advertising agent, the owner of the advertising medium and the retailer; but subsequent sections[9] provide ample defences for parties who are not to blame for the falsity of the statement.

(4) The Act gives important new powers to the Board of Trade. Under section 7 the Board may make orders defining certain terms, so that such expressions as "shrink-proof" may be given a verifiable meaning. Section 8 gives the Board a very wide power to make "marking orders" requiring goods to be accompanied "by any information (whether or not amounting to or including a trade description) or instruction relating to the goods." Under this section the Board could plug any loopholes which may appear in the definition of "trade description,"[10] and could further extend the whole principle of the Act from prohibiting misdescription to compelling disclosure. By section 9 the Board may order information (but not instructions) to be given in advertisements.

(5) Section 11 deals with the problem of bogus price reductions by making it an offence falsely to indicate that goods are offered at or below the price recommended by the manufacturer or producer, or at or below the price at which the person making the statement has himself offered the goods for a continuous period of 28 days in the last six months.[11] Of all the sections of the Act, this was the hardest to draft, because of the danger that its provisions might impede genuine price reductions. In the end Parliament decided to err on the side of caution, so that there are many loopholes in the section. For example a manufacturer can recommend an unrealistically high price so that all retailers will be able truthfully to claim that they are selling "below list price." And there is nothing in the section to prevent a retailer from falsely claiming that his prices are lower than another's—though such statements may lead to liability under other rules of law.

(6) Section 14 makes it an offence knowingly or recklessly[12] to

[9] See particularly s. 25 and also s. 24.

[10] Or in s. 11: see a letter in *The Times Business News* of August 16, 1968, from the Director of the Retail Trading Standard Association.

[11] If the recommended price is not that recommended by the manufacturer, or if the previous price has not been in operation for the periods stated above, no offence is committed if this is made plain: s. 11 (3). Thus "6d. off last week's price" may be permissible where "6d. off" would be an offence.

[12] Defined by s. 14 (2) (b): "a statement made regardless of whether it is true or false shall be deemed to be made recklessly, whether or not the person making it had reasons for believing that it might be false." Under this definition a person could be reckless even if he had *some* reason for believing the statement to be *true*.

make false statements as to the provision, in the course of a trade or business, of "any services, accommodation or facilities," and as to certain similar matters. This will apply, for example, to statements by repairers, hotel-keepers or travel agents. It seems even to cover statements in a carrier's timetable, though if such statements are suitably qualified [13] they may not be false merely because the carrier fails to comply with them. The fact that section 14 can only be contravened knowingly or recklessly, while there is no similar requirement under section 1, will make it necessary to distinguish between supply of goods and provision of services, and this may not be easy where, for example, a meal has been served in a restaurant. For civil purposes this has been treated as a sale [14]; but of course it does not follow that it will be so treated for the purposes of this Act.[15]

Neither section 11 nor section 14 penalises false statements as to the price of services, accommodation or facilities.

(7) The Act imposes a duty on local weights and measures authorities to enforce its provisions.[16] If it is alleged that an authority is failing to perform this duty, the Board of Trade may cause an inquiry to be held; and the Board is bound to publish the report of such inquiry "together with such observations, if any, as they think fit to make thereon." [17] The Act does not say what happens next; but presumably enforcement of the duty may be sought at common law, *e.g.*, by order of mandamus. There is nothing in the Act to take away powers of private prosecution. To enable weights and measures authorities to perform their duties they are given powers to make test purchases,[18] to enter premises [19] (they may do this not only on suspicion but also to make "spot checks" [20]), and to seize or detain goods or documents [21]; and it is an offence wilfully to obstruct an officer acting in pursuance of the Act.[22] These provisions are based on similar ones in other Acts [23]; but section 88 contains an interesting new provision which makes the enforcing authority liable to pay compensation to a person whose goods are lawfully seized under the Act, unless he is convicted of an offence under the Act in relation to the goods.[24] Curiously, the section does not give any rights to a person who suffers loss through the seizure

[13] *e.g.*, "Subject to alteration without notice."
[14] *Lockett* v. *A. M. Charles Ltd.* [1938] 4 All E.R. 170.
[15] The Board of Trade has under s. 15 power to make definition orders for the purposes of s. 14; but there is no power analogous to the power to make orders, conferred in relation to goods by s. 8.
[16] s. 26 (1). [17] s. 26 (3) and (4).
[18] s. 27: a power to obtain the provision of services is also conferred, but there is no power to acquire goods otherwise than by "purchase."
[19] s. 28 (1). Warrants may be granted under s. 28 (8).
[20] s. 28 (1) (*a*). [21] s. 28 (1) (*b*) and (*c*).
[22] s. 29.
[23] *e.g.*, Weights and Measures Act 1963, ss. 48, 49.
[24] Even if he is convicted, the owner is entitled to the return of the goods, the provision as to forfeiture in Merchandise Marks Act 1887, s. 2 (3) (ii), having been dropped.

of his documents.[25] An officer who discloses certain information or trade secrets obtained in the exercise of his functions under the Act is guilty of an offence[26]; but the Act does not give a person who suffers loss by reason of such disclosure any right to compensation. And no remedy at all is provided for breach of the officer's duty to leave unoccupied premises which he has entered as effectively secured against trespassers as he found them[27]; presumably the owner may sue for breach of statutory duty if loss results.

(8) Under section 17 of the Merchandise Marks Act 1887 a seller of goods was deemed to warrant the accuracy of a trade description applied to the goods. A proposal to insert a similar provision into the present Act was rejected on grounds which are not entirely convincing[28]; but the Act does contain a "saving for civil rights" in section 35, which reads: "A contract for the supply of any goods shall not be unenforceable by reason only of a contravention of this Act." But for this provision a contract for the supply of goods might become illegal on the ground that an offence under the Act had been committed in respect of it.[29] The section does not refer to contracts for the provision of services, etc., in respect of which an offence has been committed under section 14. The arguments for and against the view that such contracts are illegal cannot be elaborated here; but it is a pity that section 35 did not settle the question. Of course a person who is induced to contract for the supply of goods or services by a statement amounting to an offence under the Act may be entitled to the normal remedies for misrepresentation or breach of contract, but these may not be available—for example where the statement is as to the future and has no contractual effect; or where an offence is committed by failure to comply with a marking order under section 8 (such failure amounting for civil purposes to mere non-disclosure). Further, a civil remedy may be sought by a person who is not party to any such contract. One possibility is that a third party may suffer injury through using goods supplied in contravention of the Act. At common law such a person appears to have no remedy for breach of statutory duty[30]; but one recent Act expressly gives such a remedy[31] and it is a pity that our Act is silent on the question. Another possibility is that a rival trader may

[25] Or through the breaking open of containers under s. 28 (1) (*e*).
[26] s. 29 (5).
[27] s. 29 (4).
[28] The Lord Chancellor said: "The worst feature of the provision which the amendment seeks to preserve is that it imposes a civil liability even on a seller who was in no way to blame. . . . It would also be inconsistent with a fundamental principle of the Misrepresentation Act, namely, that there should be no right to damages where a misrepresentation is wholly innocent," H.L.Deb., Vol. 287, cols. 636–637. But apart from being hard to reconcile with s. 2 (2) of the Misrepresentation Act, the argument seems to prove too much, for it could be levelled at a great many statutory provisions by which terms are implied into contracts.
[29] See *Anderson Ltd.* v. *Daniel* [1924] 1 K.B. 138.
[30] *Cf. Square* v. *Model Farm Dairies (Bournemouth) Ltd.* [1939] 2 K.B. 365.
[31] Consumer Protection Act 1961, s. 8 (1).

suffer loss because the untrue statement draws customers away from him; and the circumstances may be such that no action lies for passing-off or injurious falsehood at common law. In the past civil claims of this kind brought in respect of contraventions of the Merchandise Marks Acts have failed,[32] but on grounds which are no longer wholly convincing in view of the terms and objects of the present Act.[33]

(9) New provisions replace the defences of acting without intent to defraud or otherwise acting innocently,[34] and their attendant case-law. The principal defence, now provided by section 24 (1), is for the person charged to prove

> "(*a*) that the commission of the offence was due to a mistake or to reliance on information supplied to him or to the act or default of another person, an accident or some other cause beyond his control; *and*
> (*b*) that he took all reasonable precautions and exercised all due diligence to avoid the commission of an offence by himself or any person under his control."

"Mistake" appears to cover not only the application of a trade description to the "wrong" goods, but also the intentional application of a false description mistakenly believed to be correct[35]; though it would probably not cover mistake of law. The concluding words of paragraph (*b*) suggest that the principle of vicarious liability will continue to apply,[36] except where an employee disobeys express orders but the employer has taken reasonable care to see that his orders were carried out.[37] A further defence of excusable *ignorance*

[32] *London Armoury Co. Ltd.* v. *Ever Ready Co. (G.B.) Ltd.* [1941] 1 K.B. 742; *Bollinger* v. *Costa Brava Wine Co.* [1960] Ch. 262 (where the plaintiff succeeded in passing-off and a prosecution under the Merchandise Marks Act 1887 failed: *The Times*, November 25, 1958.) But the rival trader might get relief in a related action: *cf. Att.-Gen.* v. *Premier Line* [1932] 1 Ch. 303.

[33] Thus the decision on the present point in *Bollinger's* case was largely based on the fact that Merchandise Marks Act 1887, s. 19, provided that: "This Act shall not exempt any person from any action . . . which might, but for the provisions of this Act, be brought against him"—but there is no corresponding provision in the 1968 Act. And the decision in the *Ever Ready* case was based on the view that Merchandise Marks Act 1926 was "intended to protect the home trade in the general interests of this country" and not any particular trade: [1941] 1 K.B. at p. 752. In moving the second reading of the present Act the Minister of State (Mr. George Darling) said that its main purpose was to protect customers but that it had "another purpose too—to help the best traders to maintain and perhaps improve their standards . . . by our putting a stop to the unfair and sometimes fraudulent practices of their competitors" H.C.Deb., Vol. 759, col. 675; *cf. ibid.* col. 732: H.L. Deb., Vol. 287, cols. 886, 405; H.L.Deb., Vol. 288, cols. 52, 101, 121.

[34] Merchandise Marks Act 1887, s. 2 (1) and (2); Merchandise Marks Act 1953, s. 5.

[35] If this is right *Kat* v. *Diment* [1951] 1 K.B. 34 might now be decided differently.

[36] See *Gray* v. *Sovereign Confectionery Co.* [1954] Crim.L.R. 215; *Mear* v. *Baker* [1954] Crim.L.R. 719; *Sears* v. *S.W. Gas Board* [1958] Crim.L.R. 564.

[37] If this is right *Slatcher* v. *George Mence Smith* [1951] 2 K.B. 631 would now be differently decided.

(not requiring affirmative proof of mistake) is provided for (in effect) retailers who are charged with supplying, etc., goods to which a false trade description has been applied[38]; and for owners of advertising media who are charged with an offence committed by the publication of an advertisement.[39] Where the defence of act or default of another is raised, notice to this effect must be given to the prosecution,[40] so that they can take proceedings against that other person; but such proceedings cannot, as under other legislation,[41] be combined with the proceedings against the original defendant. Where the commission of an offence by one person is due to the "act or default of another person" the latter may be convicted "whether or not proceedings are taken against the first-mentioned person,"[42] and presumably (if such proceedings are taken) whether or not the first-mentioned person is convicted.[43] On the other hand the Act also contains[44] the common form clause that where an offence has been committed by a body corporate and "is proved to have been committed with the consent and[45] connivance or to be attributable to any neglect on the part of any director [etc.] . . . he as well as the body corporate shall be guilty of that offence . . ." and under this provision it seems that the director cannot be convicted if the body corporate is charged and acquitted. Thus the question whether the director can be convicted without the corporation seems to turn on the distinction between cases in which the commission of the offence is "due to [his] default" and those in which it is "attributable to [his] neglect."

This is by no means the only group of provisions in relation to which the drafting of the Act gives rise to difficulties of interpretation, or to distinctions which do not seem easy to justify. Other examples are to be found in the three separate provisions concerning false claims that goods or services have been approved by or supplied to certain persons[46]; and in the two apparently overlapping definitions of offer which have to be applied for the purpose of section 11.[47] The Molony Committee thought that this branch of the law "affecting transactions of everyday occurrence . . . should be contained in a single enactment and stated in language as plain and simple as modern draftsmanship can provide."[48] We now at least have a

[38] s. 24 (3).
[39] s. 25.
[40] s. 24 (3).
[41] *e.g.*, Food and Drugs Act 1955, s. 113.
[42] s. 23.
[43] He may satisfy para. (*a*) of s. 24 (1), *supra*, but fail to satisfy para. (*b*).
[44] s. 20.
[45] *Sic.* The usual form is "consent *or* connivance," *e.g.*, Food and Drugs Act 1955, s. 107; Weights and Measures Act 1963, s. 50; Companies Act 1967, s. 89. At least eight other 1967 Acts follow the usual form but there is no point in citing them here. It is not clear why the present Act uses a different form, or what effect this has.
[46] ss. 2 (1) (*g*), 12 and 13.
[47] s. 11 (1) (*d*) provided that "For the purpose of this section . . . a person advertising goods as available for supply shall be taken as offering to supply them," but presumably the definition in s. 5 (*ante*, para. 3) also applies (see s. 1 (2) to s. 11).
[48] Cmnd. 1781, para. 610 (1962).

single enactment and even if it is not exactly simple and plain it does make important improvements in the law. The most significant of these may well turn out to be the enforcement provisions; for the success of the Act in eliminating undesirable trading practices will depend to a large extent on the vigour with which it is enforced.[49]

G. H. TREITEL.

CIVIL EVIDENCE ACT 1968 [1]

IN a modern sophisticated age it is highly doubtful whether we need rules of evidence at all. As Lord Gardiner L.C. has said [2]: "I do not believe in the law of evidence at all. . . . I am quite sure that within twenty years we shall have no law of evidence at all." General statutory guidance, judicial discretion and proper professional standards should suffice to enable the truth to be discovered so far as this is possible in the court setting. However, this happy state of affairs has not yet been reached, but meanwhile a measure of relaxation of old rigid rules in respect of hearsay, opinion and privilege in civil cases is welcome as a step in the right direction.

Hearsay

The hearsay rule developed during a period when all issues of fact in civil cases were determined by juries, whose standard of education was lower than today and who were thought to be ill qualified to estimate the comparative probative value of alternative methods of proof. Today practically all civil cases are tried by a judge alone. Traditional arguments in support of the hearsay rule have been that evidence not under oath and not subject to cross-examination might be unreliable, that it was desirable to adduce the best evidence, and that a relaxation of the rule would lead to a proliferation of evidence directed to establishing a particular fact.[3]

The principle behind the new legislation is that first-hand hearsay is now generally admissible and second-hand hearsay is inadmissible except in special circumstances. Any statement by a person which would be admissible if direct oral evidence were given by him

[49] *Ibid.* para. 44: "The consumer is not as well served as he should be by the Merchandise Marks legislation because of its imperfect enforcement."

[1] Hearsay Evidence in Civil Proceedings, 18th Report of the Law Reform Committee, Cmnd. 2964, May 1966. The Rule in *Hollington* v. *Hewthorn*, 15th Report of the Law Reform Committee, Cmnd. 3391, September 1967. Privilege in Civil Proceedings, 16th Report of the Law Reform Committee, Cmnd. 3472, December 1967.

H.L.Deb., Vol. 288, cols. 1339–1364, February 8, 1968 (Second Reading). H.L.Deb., Vol. 289, cols. 686–695, February 22, 1968 (Committee). H.L. Deb., Vol. 289, cols. 1454–1479, March 7, 1968. H.C.Deb., Vol. 290, cols. 681–692, March 21, 1968 (Third Reading). Standing Committee E, June 20, 1968.

[2] H.L.Deb., Vol. 289, cols. 1461–1462, March 7, 1968.

[3] Law Reform Committee, 18th Report, paras. 7–10. R. F. V. Heuston, *Lives of the Lord Chancellors* 1885–1940, pp. 553–555.

is now admissible as evidence of the truth of that statement.[4] As regards second-hand hearsay a statement contained in a document is admissible as evidence of the facts stated if it is a record compiled by a person acting under a duty from information from persons reasonably supposed to have personal knowledge of the facts, supplied either directly to the recorder or indirectly by intermediaries acting under a duty.[5] A "duty" here includes those to be performed in any trade, business, profession or other occupation, or any paid or unpaid office.[6] Another exception is evidence obtained through a computer.[7] In addition the old common law exceptions applicable to multiple hearsay are enacted, *e.g.*, reputation, pedigree, public rights.[8]

In order to ensure that a party is not taken by surprise and that hearsay is not admitted except for good reason, Rules of Court prescribe that particulars of the hearsay proposed to be adduced must be given to the other side before trial, and by counter-notice the other side can require the witness to be called except where he is unavailable or cannot reasonably be expected to recollect the matters relevant to his statement.[9]

The demise of the old rigid hearsay rule is certainly to be welcomed. But the failure of the new legislation to introduce a simple new principle is sad. It is submitted that the distinction between first-hand hearsay, made generally admissible, and second-hand hearsay, admissible only in special circumstances, is unnecessary, illogical and illusory. The fears that if hearsay were admitted without qualification the floodgates would be opened to prolonged and inferior evidence are unjustified. The floodgates argument proved groundless in 1988, judges retain control over the proceedings, and no competent counsel will adduce inferior evidence when better is available.

The new scheme is illogical because there is no cogent reason for saying that first-hand hearsay is prima facie reliable whereas second-hand hearsay is prima facie unreliable. The length of the chain should go to weight, not to admissibility. The statutory enactment of the common law exceptions to the admissibility of second-hand hearsay is welcome in so far as the principle of statutory codification is welcome, but these exceptions are old-fashioned, arbitrary and miscellaneous and not based upon any unifying principle. If only certain types of second-hand evidence are to be admissible a fresh start should have been made to develop new contemporary principles. Better still would have been to vest a general discretion in the judges subject to certain general statutory guidance, *e.g.*, exclusion if in all the circumstances it seems likely to prove particularly unreliable.

[4] s. 2 (1).
[5] s. 4 (1).
[6] s. 4 (3).
[7] s. 5.
[8] s. 9.
[9] s. 8 (2).

As the new law applies to all civil proceedings, including civil proceedings in the magistrates' courts, this is another reason for a simple flexible approach. Alternatively, if it is thought that too much discretion should not be left to magistrates it would have been possible to have confined a new discretionary approach to the High Court and county court only.

Incidentally, if the notice to admit facts procedure were used more widely and the sanction in costs for default more widely applied a lot of the difficulty over the admissibility of hearsay would be eliminated.

The duty concept is extraordinarily artificial and inept, particularly that the recorder, and each and every recorder along the line, should be under a duty to record, but not that the supplier should have a duty to supply. The reliability of a record derives from the fact that it was made in the course of ordinary repetitive business practice, not from any duty.[10] The relevant considerations ought to have been the likelihood of accuracy, of accurate recording, and of accurate transmission. It would have been better to have said that second-hand hearsay should be admitted in evidence, subject to the discretion of the judge, if he is satisfied that the information was initially supplied by a person with personal knowledge, that it was accurately recorded, and, where appropriate, that it was accurately transmitted and received.

Acknowledging the way things are going, the legislation makes appropriate provision for computers, although the section is a morass of drafting, and on principle it should not be necessary to legislate specially for them. The problem with computer evidence is not the accuracy of the calculation but the reliability of the data fed in and the transcription and interpretation of the "print out" data produced.

Previous Statements of Witnesses

When a person is called as a witness any previous oral or written statement made by him may now be proved by him or someone who heard him make it or by production of the document, subject to leave of the court, but the statement may not be proved before the conclusion of the examination in chief unless it would adversely affect the intelligibility of his evidence.[11] Manifestly it is undesirable that a witness should just put in his proof, but it would have been better to have let him recount his story and put in his proof at the appropriate stage, and also it would have been better to have required notice to be given beforehand, so as to eliminate surprise and to further the policy of disclosure. The judge is unlikely to

[10] The duty concept does not appear in the Criminal Evidence Act 1965 in which only the course of trade or business and personal knowledge in the ultimate supplier is necessary. It is not clear whether "duty" includes a moral duty to record information.

[11] ss. 2 (2) and 4 (2). Law Reform Committee, 13th Report, paras. 35–39.

permit a witness to put in his proof of evidence recently taken by the solicitor, but he is likely to admit an eye-witness statement or a proof given soon after the accident in respect of which the trial takes place many many months later.

A party may put in evidence a previous inconsistent or contradictory statement not only to discredit his opponent's witness but also as evidence of the facts contained in it. Also a previous consistent statement may be put in evidence to rebut a suggestion that evidence has been fabricated, again as evidence of the facts contained in it.[13] The "fabrication" concept is unfortunately too narrow, and it would have been much better to have made previous statements admissible for rebutting imputations on the general veracity of the witness or that his evidence was inaccurate or inconsistent or mistaken.

Convictions as Evidence in Civil Proceedings

In any civil proceedings the fact that a person has been convicted of a criminal offence before any court in the United Kingdom is now admissible in evidence for the purpose of proving that he committed the offence, whether he was so convicted upon a plea of guilty or otherwise and whether or not he is a party to the civil proceedings.[13] The fact may be rebutted by the party against whom the conviction is adduced, the burden of proof being on him on the balance of probabilities, because the issues in the criminal case may have been different, though related, *e.g.*, the crime of careless driving is not necessarily the same as the tort of negligent driving. The problem will lie in identifying the issues determined by the criminal court and may involve the civil courts in a close consideration of the elements of criminal offences in circumstances where the primary consideration will not be the enforcement of the criminal law.[14]

In defamation actions the proof of a conviction is now conclusive evidence of guilt,[15] not merely rebuttable evidence of guilt. The reason for this eminently sound rule is that it is contrary to public policy to allow a person to reopen the very issue settled in the criminal proceedings and not to protect the defendant, who incautiously said that the plaintiff was a murderer when he should have said was convicted of murder, from having to prove guilt.

Findings of adultery in matrimonial proceedings and of paternity in affiliation proceedings are now admissible as rebuttable evidence

[13] s. 8.
[13] s. 11 (1).
[14] Michael Dean, (1968) 31 M.L.R., pp. 62–68.
[15] s. 13. The JUSTICE Report on *Home Office Review of Criminal Convictions*, February 1968, urges improved procedures for investigating allegations of wrongful conviction. J. A. Andrews, "The Criminal in the Civil Courts" [1967] Crim.L.R. 441–454. Michael Dean, "The Rule in *Hollington* v. *Hewthorn*" (1968) 31 M.L.R. 58. The Rule in *Hollington* v. *Hewthorn*, 15th Report of the Law Reform Committee, Cmnd. 3391.

of the facts on which the findings were based.[16] In divorce proceedings the co-respondent has an opportunity of defending himself and the judge has a statutory duty to satisfy himself that the adultery is made out. In affiliation proceedings there is a high standard of proof, including corroboration.

Privilege

Whether or not there should be legal privilege arising out of marital relationships involves a value judgment and depends upon the social and religious importance attached to the institution of marriage when compared to the importance of getting at the truth. In an unselfconscious age in which sexual matters do not create inhibitions and sexual deviance does not involve criminal sanctions, and indeed only slight civil and social sanctions if any, the abolition of the privilege to refuse to answer questions tending to show that a witness has had marital intercourse [17] or has committed adultery [18] is understandable and to be welcomed. So far as the privilege against self-incrimination is concerned, it is more repellent that a husband should be compelled to incriminate his wife, or a wife her husband, than that either should be compelled to incriminate himself or herself,[19] and accordingly the privilege is rightly statutorily extended to cover the spouse.[20] But having thus recognised the intimate relationship in marriage the legislature has, some may think illogically, abolished any privilege for communications between spouses. It is true that the old law under which the privilege was enjoyed by the spouse to whom instead of by whom the communications were made was illogical and indefensible and is rightly abolished.[21] But to deny any privilege to the spouse by whom the communication was made, or to both spouses jointly, seems a harsh policy. The Law Reform Committee took the view "that such a privilege in civil actions other than actions between spouses is of little practical importance and would have a minimal effect upon marital relations. . . . On the whole, we think that the reasonable protection of the confidential relationship between husband and wife is best left to the discretion of the judge and, we may add, the good taste of counsel." [22] The exercise of a judicial discretion in this area may well prove a satisfactory solution though some may feel that retention of the privilege would accord more with contemporary social ethics and would represent what most spouses would

[16] s. 12 (2).
[17] s. 16 (4).
[18] s. 16 (5).
[19] Law Reform Committee, 16th Report, para. 9. This relates only to civil proceedings, but the Criminal Law Revision Committee apparently take the same view in respect of criminal proceedings.
[20] s. 14 (3).
[21] s. 16 (3), repealing Evidence (Amendment) Act 1853, s. 3.
[22] Law Reform Committee, 16th Report, para. 43.

imagine to be the legal position in communicating to his or her spouse.

Certain obsolescent privileges are sensibly abolished, such as those relating to forfeiture, documents of title to land and documents relating solely to a party's own case.[23] *

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ALEC SAMUELS.

[23] s. 16.

* We wish to acknowledge the help derived from the discussions and reports by the JUSTICE Evidence Committee, Chairman Lewis Hawser, Q.C., Secretary Colin Tapper, to which we contributed, but responsibility for the text is ours alone.

REPORTS OF COMMITTEES

Report of the Royal Commission on Trade Unions and Employers' Associations [1]

It is not possible in a short note to do justice to the baker's dozen of curate's eggs enshrined in the Donovan Report and its twelve research papers.[2] Inevitably the Report of the first Royal Commission on labour law and industrial relations since 1906 attracts attention; but the research papers, produced by the unit under Dr. McCarthy, specially created by the wisdom of the Commission, could in the long run turn out to be of even greater significance. The Commission unfortunately became known as a Commission on "trade unions"; but its terms of reference were incomparably wider, including all "relations between managements and employees." This brief note concentrates upon features of the Report of special interest to lawyers, and must perforce ignore many individual dissents by particular Commissioners all of whom signed the Report.

The Report is most important for its analysis of the character of British industrial relations. In legal terms, the process which began with the *exclusion* of common law and allied doctrines from industrial affairs between 1871 and 1906 (because the ordinary doctrines would have made a modern system of collective bargaining impossible without constant risk of illegality for workers' organisations) was rationalised between 1920 and 1950 into the principle of "voluntarism" or "abstention of the law" from collective labour relations. It is important to understand that this notion is not equivalent to an *absence* of labour law. It means that labour law assumes a special form. The statutes protecting rights to take industrial action are "negative" not "positive," *i.e.*, do not set out rights to strike, etc., but exclude doctrines which would make some acts unlawful in trade disputes. Laws about collective bargaining do not regulate its forms; they act as props to the system of voluntary negotiation, as in the case of the Terms and Conditions of Employment Act 1959. (The Prices and Incomes Acts 1966–1968 are the first major exception here since the repeal of the unused and repealed Act of 1927.) As for individual employment law, we have had a lot of it; Factories Acts from 1833 to 1961 (currently about to be recodified), and more recently the Acts on contracts of employment and redundancy of 1963 and 1965. But none of these has inhibited collective bargaining *above* the floor of rights thereby established for each worker, unionist or not. A failure to appreciate

[1] Report of Royal Commission on Trade Unions and Employers' Associations 1965–1968, Chairman Rt. Hon. Lord Donovan (Cmnd. 3623, H.M.S.O.).

[2] Research Papers 1 to 11 (listed in Appendix 4), and "Workplace Industrial Relations" (Government Social Survey. SS. 402, H.M.S.O.).

this character of British labour law legislation vitiates, in the writer's opinion, much of the dissenting report (for that is what it is) by Mr. A. Shonfield where he counterposes to that of the majority a rather different analysis and very different proposals.

The basic problem, the Commission found, was the existence of two systems of industrial relations in Britain, the one formal and largely industry-wide, the other informal, dominated often by unwritten "custom and practice," operating largely at plant level. "What is needed first of all is a change in the nature of British collective bargaining, and a more orderly method for workers and their representatives to exercise their influence in the factory; and for this to be accomplished, if possible, without destroying the British tradition of keeping industrial relations out of the courts" (para. 190). The basic choice for the Commission was this: Should that reform be attempted by use primarily of legal sanction, or by other methods, using law where appropriate to create new machinery? The critical feature of the Report is its crushing weight of argument in favour of the second means to achieve its stated objective.

Thus, it proposes that an Industrial Relations Commission be established (though without legal "teeth"); and that companies of a certain size must register their collective agreements with the Department of Employment. The purpose of the latter idea is obscure, as is its practicability in view of the oral nature of many plant agreements. (Nor is it clear why the "civil service" should escape the obligation to register (para. 197).) Under the prodding influence of the I.R.C. companies would reform their bargains, recognising the reality of the dominance of the "factory" or plant agreement, adopting wherever possible the principles outlined in the vital paragraph 208 of the Report; management recognising its responsibility to take the lead; the trade unions closing the gap between officials and shop stewards (who come out of the report with flying colours) in order to "integrate" the latter into the "orderly" system. As important as the reform of bargaining institutions is the *extension* of the range of collective bargaining. But, again, except for recommending that the "yellow dog" employment contract be illegal, the Report proposes few legal sanctions for the job. Employers ought to recognise unions; but the I.R.C. would be able only to guide and encourage, not compel, recalcitrant employers (para. 256). Unions should have a right to unilateral arbitration restored to them (similar to Order 1376 of 1951); but it would relate to substantive claims not to recognition itself, and should be exercisable only when the Secretary of State certifies on the advice of the I.R.C. (the arbitral body being the Industrial Court). One is left doubtful that these proposals would alter the practice of the small and foreign firms described in the T.U.C. Report of 1967.[3] One specific proposal is that no Friendly Society should be allowed to forbid members

[3] T.U.C. Report 1967, pp. 130–135 (General Council's Report) and pp. 444–446 (debates). A motion on foreign firms was passed also at the 1968 Conference.

to join a trade union—a proposal aimed at the Foreman and Mutual Staff Benefit Society; but already A.S.T.M.S. has anticipated the Commission by a cunning use of private Act procedure in its private Bill introduced in 1967. Otherwise, the Report scarcely discusses "company unions," which is odd.

Given this base, it is not surprising that in the lengthy chapters devoted to current problems which affect the relations between British management and employees, the Commission rarely proposes any major use of legal sanctions as the way out. A careful review of the problems of manpower utilisation, for example, includes a reasoned rejection of a "Restrictive Labour Practices Tribunal" (paras. 312–317); and the questions of training and re-training (perhaps the most critical facing British industry) and of women workers (the most exploited group of all) lead to many positive proposals with few legal dimensions. Indeed, there is not even a proposal for new law on equal pay for women, nor even on compulsory committees and workers' safety delegates in connection with industrial accidents—a subject glaringly omitted from the report. Further, the majority strikingly reject compulsory introduction of "workers' directors" in industry as the way forward, and insist that the extension of collective bargaining is the route to greater "industrial democracy," in the writer's opinion a correct assessment of the perspective for the private sector of the economy (Chap. XV).

The more "legal" proposals of the Commission may be summarised under four headings. First, as regards "individual" employment law two major suggestions are made. Employees should have the right to challege "unfair" dismissals before independent tribunals, in accordance with I.L.O. Recommendation 119. Certain reasons should be declared invalid grounds for dismissal, such as race; colour; religious or political opinion (though no equivalent proposal is made to stop unions barring members from office on that ground); sex or marital status; and trade union membership or activity. In these cases the employer should be "obliged to explain" the dismissal; in others the worker should prove the grounds of unfairness. Most trade unionists seem to take the view that employers can always find a "valid" reason if they want to —a view partly supported by the experience of the Redundancy Payments Act 1965; but such a statute would probably do something to improve the protection of millions of unorganised workers. The Report differs from the report of the Committee of the N.J.A.C. which preferred voluntary methods to statutory tribunals.[4] But the difference is more apparent than real because the Commission recommends that the Secretary of State on the advice of the I.R.C. could "exempt" workers covered by a "satisfactory" voluntary procedure from their right to go to the tribunal (para. 560). One can

[4] *Dismissal Procedures* (H.M.S.O. 1967)) noted by Judith Reid (1968) 31 M.L.R. 64.

foresee grievances being felt by such workers if they feel that their case has not been properly handled by their union. Even workers who had such a right would have to complain within five days of dismissal (an extraordinarily narrow margin) and would have no right to be merely suspended during the hearing of the case (paras. 546–547). The right to strike about dismissals should be unimpaired; but the major remedy would be not reinstatement but compensation —the reverse of the normal position under voluntary procedures, which would have to include compensation provisions before they could be "exempted"—and the compensation should not include any "punitive" element, being limited to a maximum of two years' wages (scarcely a princely sum for a worker deprived of his livelihood for reasons which the law declares invalid).

All such disputes and all other individual employment disputes should, the Commission proposes, be heard by *Labour Tribunals*—subject to certain rights to go to the ordinary courts. These would be, in fact, the present Industrial Tribunals; but they should in all appropriate cases adopt a conciliation procedure before adjudicating the case, to try to get an agreed settlement. In this welcome recommendation the Commission reflects the influence of the French system of *Conseils de Prud'hommes*.[5] It is, therefore, strange that the Commission appears not to have asked itself why such Tribunals need a "legally qualified" chairman between the lay wingmen; for the *Conseils* have operated for a century and a half largely—and best—without the intervention of lawyers as judges. Further, since the Labour Tribunals are to be based on the present Industrial Tribunals, and since the Commission rightly insists on speed and informality in their proceedings, it is notable that the one gap in the research papers is a full account of the workings of the Tribunals now in existence. Early experience of redundancy cases suggested in 1967 that such cases were taking about ten weeks from receipt of Form 1, and about three to four months from the dismissal to adjudication.[6] The time might be even longer if an unsuccessful conciliation session intervened—a long time for an "unfairly" dismissed worker to wait for his compensation. Lastly, all experience of labour courts shows that appeals to the ordinary courts bring out the worst in the judiciary—both France and Germany are examples. Yet the Report conventionally proposes that appeals on points of law should lie to the High Court. At least, however, it adds that British lawyers are ill-equipped for the task of understanding labour law and firmly calls on the professions and universities to give lawyers "at least an elementary knowledge of industrial relations."

[5] See W. H. McPherson and F. Meyers, *The French Labour Courts: Judgment by Peers* (Illinois, 1960); G. Camerlynck and G. Lyon-Caen, *Droit du Travail* (Dalloz, 1966), Chapter VI.

[6] Reported in K. W. Wedderburn and P. Davies, *Employment Grievances and Disputes Procedures in Britain* (forthcoming, U.C.L.A.), Part 4.

Secondly, the Commission suggests new machinery to help solve the problems of industrial life, including unofficial and unconstitutional strikes. The I.R.C., for example, in addition to the functions previously described, should investigate such problems and supplement the present methods of investigation and inquiry under the Acts of 1919 and 1896. Nearer the ground, the local Industrial Relations Officers should have new powers to demand information and inquire into difficult stoppages (para. 448). [There are currently only fifty-five such officers, and they have a multitude of conflicting functions already; this new task of acting as local "mini-Scamps" might be the last straw. The work of Scamp himself, by the way, seems to be rather briefly dismissed by the Report.] Further, it is proposed that all arbitrators should give reasons for their awards,[1] and in all cases be *legally* bound to observe current Government demands on "incomes policy" (para. 285). This type of thinking stems from a "monolithic" model, where incomes policy and industrial law are combined into a single unity. But even under the present Acts, the British model has been a "two-tier" system —the collective bargaining operating first, and the Government's fluctuating policies coming in later. The Report itself makes this distinction in an earlier passage where it describes the "short-run" nature of changing incomes policies (para. 208). The proposal in paragraph 285 could spell the death of a valuable tradition of voluntary arbitration.

These proposals for new machinery stem, however, partly from the masterly analysis in Chapters VII and VIII, to which justice cannot be done here, in which it is demonstrated that most of the fashionable remedies for strikes by way of new legal sanction (compulsory strike ballots, cooling-off periods, etc.) would be of little profit to anyone. In particular, Chapter VIII overwhelmingly shows that no good could come from making collective agreements legally enforceable as such (though a majority favours the repeal of section 4 of the 1871 Act). No benefit can come from legally enforcing defective "procedure" agreements when the priority is to improve them. Employers do not use their right to sue workers now (*e.g.*, for breach of employment contract). Sanctions against unions would not cure unofficial action; and as the Devlin Report put it, unions cannot be made into industry's "policemen." Automatic sanctions against strikers by way of loss of social security rights are useless after the first occasion for afterwards the men have nothing to lose. Other sanctions against individual strikers are shown not to be relevant to the *causes* rather than the

[1] The Commission was in error in saying that voluntary arbitrators do not give reasons (para. 286). Some bodies and single arbitrators invariably do give reasoned decisions. The Industrial Court normally does not do so, on the good grounds explained by the President in his Evidence to the Commission, Day 45, paras. 4–8, which are not discussed in the Report. On incomes policy, see the same Evidence, paras. 9–20; and for an explanation of the "political" character of such policies, see A. Shonfield, *Modern Capitalism*, pp. 218–219.

symptoms of stoppages, although, as we shall see, a bare majority of Commissioners later made a proposal inconsistent with this view. Indeed the argument in Chapter VIII is so strong that it is surprising to find the Report going on to say that in a few years' time it may be necessary to reconsider the point. By then, either procedures for settling grievances will be improved as the Commission hopes; or they will not, in which case all the objections of Chapter VIII to legal sanction will continue to apply. One final point may be made here. It is sometimes said that, with the removal of section 4 of the 1871 Act, the "ordinary law of contract" will apply and therefore no new element would be introduced if employers enforced collective agreements against unions in the courts.[a] This can be misleading. At present the collective industrial parties are taken *not* to "intend to make a legally binding contract" (para. 470). Therefore, the employer must buy legal enforceability if he can. If the presumption were by law reversed, the union would always have to buy off legal sanction, and its position at the bargaining table would be materially altered.

Thirdly, what of trade union law as such? Most welcome is the proposal to codify the law and have it kept under review by a Committee attached to the I.R.C. New legal definitions should be enacted for employers' associations (on which the Report has very little to say) and for trade unions. In a flight of Realist jurisprudence, which pays scant regard to Professor Herbert Hart, the Report commits itself to Dicey's view that a trade union "by the very nature of things differs from the individuals of whom it is constituted" as being "true." A trade union should be obliged to register and thereupon receive corporate status. An odd attempt is made to justify this on the ground that the clarification of the current procedural muddle about unregistered unions would involve some measure of registration; whereas, of course, partnerships have in England managed very well without such a law but with appropriate Rules of the Supreme Court. The demand for compulsory registration is likely to be viewed with suspicion by the unions, especially as it is usually discussed, as it was in 1894, in connection with enforcement of collective agreements. The change in the definition proposed is not great (mainly omitting "temporary" combinations). What then of Mr. Woodcock's famous seven men who decide to become a union? They would have to register before the law recognised them as such —with one exception. The Report proposes that sections 2 and 8 of the 1871 Act should continue to apply to all trade unions as *now* defined. So there would be two definitions after all.

In Chapter XI important proposals are made to govern the rules and the practices of trade unions. Rule books should be modernised and made less ambiguous; and the Registrar should have a stronger

[a] See, for example, the argument in *Fair Deal at Work* (Conservative Political Centre), pp. 82–85.

right to demand rules matching up to certain standards on admission; discipline and expulsion; disputes between member and union; and the place of shop stewards. New requirements for audit of union funds should be enacted; but the present system of contracting out of the political fund should be retained as in the Act of 1913 (a special Appendix 7 refutes in detail proposals for changes in this law). Few unions would object to all this. But the Report goes on to recommend new regulation. No person accepted as a member for two years should be allowed to be shown to be ineligible for membership in a closed shop situation unless guilty of fraud on admission. On the whole, the closed shop is shown to be a reasonable objective reasonably administered by most unions. But closed shop or not, the Report recommends that a new "Review Body" be established (two trade unionists; and the inevitable lawyer as chairman—why?). To this any member should have the right to complain of breach of union rules or of principles of natural justice; of election malpractices or irregularities under statutes such as the 1913 Act; and of unfair penalties involving "substantial injustice." An appeal would lie too against "arbitrary rejection" of an application for admission. The list escalates into the most controversial proposals. No definition of "arbitrary," for example, is attempted, although the section on training makes it clear that the proposal is aimed at craft unions who refuse membership to a man suitably qualified to conduct his trade. But the Report also speaks of a man's "right to use the skills which he has acquired" (para. 618). The right to control admission to the union is often part of the union's share in job-control. If this is to be subject to the jurisdiction of a review body, it plainly should follow that an applicant for a job for which he is suitably skilled should have the right to appeal against an *employer's* refusal to employ him. The Report makes no such balancing recommendation. On problems such as multi-unionism and the place of shop stewards (including the important phenomenon of inter-plant stewards' committees) the Report is less interventionist and makes proposals for progress which the unions themselves could make effective, with the aid if necessary of the I.R.C.

Lastly, a rather confused chapter makes proposals on the law governing trade disputes. Socially, the most important could be that which suggests narrowing the scope of disqualification from unemployment benefit of workers unemployed due to a stoppage at their place of work. In a long section (paras. 958–996) the most important suggestions are that members in the same grade or class as the strikers should no longer be disqualified; and that a worker should not be regarded as "financing" a strike merely because he is in the same union as the strikers. As for trade dispute law proper, various minor amendments are proposed:—section 2 of the 1906 Act should be strengthened to allow peaceful persuasion of customers by pickets; any risk of liability for conspiracy to break contracts

(resting on *Rookes* v. *Barnard*) should be removed; sections 4 and 5 of the 1875 Act should be retained, apparently for no better reason than that their repeal might be "construed as an express licence to do" what is now forbidden. The unions' immunity in tort under section 4 (1) of the 1906 Act would apply only to registered unions; it should protect against damages and (contrary to some modern judicial views) also injunctions; but it should be restricted to acts done in contemplation or furtherance of trade disputes. One expects, therefore, an extended consideration of the modern cases in which judges have been restricting the scope of the golden formula of "trade dispute" defined in section 5 (3), especially in cases of inter-union rivalry. The Report disappoints such expectations. The term "workmen" should be revised to include all "employees." (In passing, it is bizarre that nowhere do the Commissioners turn their minds to the burning question of who exactly *is* an "employee" in these days of growing "self-employment.")[9] Otherwise the Report regards the definition in section 5 (3) as adequate (except for three Commissioners who would restrict its application in inter-union cases, a dissent which seems to overlook the fact that the courts are well on the way to producing that result already). The reasonable proposal for restriction of section 4 (1) to trade disputes is likely to be opposed by unions who feel that the definition in section 5 (3) is not being interpreted today in the same way as it was between 1920 and 1964.

The most remarkable recommendation, however, is that of a majority of seven Commissioners concerning inducing breach of contracts of employment and section 3. First, it must be remarked that the Commission agrees unanimously that section 3 must be extended to cover inducing breach of commercial contracts to protect the right to strike after recent decisions such as *Stratford* v. *Lindley*. But ironically, much of the Report's discussion has here been overtaken by judicial creativity effected before the ink on its pages was dry. For example, much of its advice as to what can and cannot be done without tortious liability (*e.g.*, para. 891) is open to grave doubt in the light of recent judicial opinion extending the notion of "inducement"; putting indirect and direct inducement on the same footing; and finding liability even where there was no breach of contract induced.[10] Similarly, the Report seems to accept that at least some strike notices are no more than notices of *breach* of employment contracts rather than of termination. It therefore considers whether the introduction of a doctrine of "suspension" of such contracts in

[9] The problem in regard to the building industry is discussed in the Phelps Brown Committee of Inquiry (Cmnd. 3714, 1968, H.M.S.O.), especially in Appendix III by Dr. R. W. Rideout.

[10] Respectively in *Square Grip Reinforcement Ltd.* v. *MacDonald*, 1968 S.L.T. 65 (noted *ante* (1968) 31 M.L.R. 550); *Daily Mirror Newspapers* v. *Gardner* [1968] 2 W.L.R. 1289 (C.A.), *per* Lord Denning M.R. at p. 1250 (noted *ante* (1968) 31 M.L.R. 440); and *Torquay Hotel Co. Ltd.* v. *Cousins* [1968] 3 All E.R. 43 (noted *ante* (1968) 31 M.L.R. 555, A. S. Grabiner).

trade disputes (in the European manner) is the answer, and concludes that it is not, giving eight strong objections to the concept (para. 948). Yet Lord Denning M.R. has recently conjured such a doctrine out of the interstices of the common law, without consideration of any of the eight points.[11] In this confusion, the majority of seven drop their bombshell. Section 8 (as reformed), they say, should apply only to registered trade unions and employers' associations and persons "acting in an authorised capacity" on their behalf.[12] The problems are immediately apparent. When is a shop steward an "authorised agent"? Does ratification by the union relate back? As the minority of five energetically point out (para. 804) the proposal would leave ordinary workers, even if union members, without the protection of either section 8 or section 1 of the 1906 Act; and it is clearly "incompatible with the proposals made in this report for the reform of the collective bargaining system." Indeed it is. But worse than that, it involves a theoretical shift in trade dispute law of fundamental importance. Since 1906, "any person" has received the protection of the Trade Disputes Acts. The majority would allow it only to those who registered on state imposed terms. Perhaps it is old-fashioned liberalism to dislike the corporate flavour of such recommendations. Certainly few suggestions could do more to inflame the industrial temperature.

Despite these criticisms, the Donovan Report is fundamentally a document based on a common sense analysis. There is, however, a problem latent even in its unanimous recommendations. The objective is to make the system more "orderly" and to "integrate" plant bargainers into the system. This can mean two very different things. It may aim at the improvement of procedures for grievances and a strengthening of bargaining on the shop floor. Many passages show that some Commissioners had this in mind (*e.g.*, those which insist that management must give stewards proper facilities). But it may mean that the bargainers are to be wrapped up in a package of state regulation, the stewards "integrated," the arbitrators bound by incomes policy, all neat and tidy. Much will depend upon the interpretation put upon the objective by the Industrial Relations Commission when it comes to be established as, no doubt, it will be very soon.

K. W. WEDDERBURN.

[11] *Morgan* v. *Fry*, [1968] 3 W.L.R. 506 (C.A.). I am indebted to Mr. B. Thompson for drawing to my attention the decision, as yet unreported, of the Inner House of the Court of Session in *Cummings* v. *Charles Connell & Co. Ltd.*, on May 28, 1968, in which the court held that a lock-out by certain employers did not have the effect of "suspending" the contracts of employment but was in the circumstances of that case a breach of contract. The judges did there advert to some of the eight problems raised in the Royal Commission Report.

[12] This is the phrase used by Lord Tangley in his separate Note, at p. 287. With respect to the other members of the majority, this is the only place in which the proposal is put in a manner which is legally intelligible and clear; and Lord Tangley understood this to be the intended meaning of his colleagues in the majority of seven.

Law Commission: Civil Liability for Animals.[1]

Many lawyers must share the Law Commission's view that the present law relating to civil liability for animals "is in an unsatisfactory state and that it continues to apply rules and draw distinctions which make little sense in modern conditions," and therefore have been glad when this topic appeared as Item V in the Commission's First Programme. But those who thought they detected in the phraseology of Item V the prospect of radical reform will be disappointed, for, while welcome rationalisation is recommended within the existing framework of liability, the ancient categories themselves are undisturbed. The Commissioners approached this controversial subject well armed, as they had available to them the Report of the Goddard Committee,[2] the Twelfth Report of the Law Reform Committee for Scotland,[3] some Private Members' Bills (the latest being Sir Barnett Janner's Highways (Straying Animals) Bill introduced on November 29, 1966), as well as Professor Glanville Williams' monograph on the subject.[4] With such a wealth of experience and material at their disposal, it was reasonable to expect some elegant and effective suggestions for reform. But it turns out that this well-trodden path should instead have been regarded as a danger signal because the recommendations of the Commission fail to provide the general coherence which is missing from this area of the law. Here it is proposed to consider these recommendations in relation to the existing categories of liability for animals and, briefly, in the context of civil liability as a whole.

In relation to the established categories of animal liability, it is fair to say that the changes advocated, with the exception of the abolition of the rule in *Searle* v. *Wallbank*,[5] are changes of detail only. The established classification remains: strict liability in respect of animals *ferae naturae*; a modified *scienter* rule; a new rule of strict liability for trespassing cattle, and the general liability in negligence. This comes as a surprise as it is surely these very categories, rather than the detail within them, which involve the drawing of "distinctions which make little sense in modern conditions" and which constitute the "unsatisfactory state" to which the Commission refers in the First Programme. At the heart of the matter is the distinction which the law has traditionally drawn between dangerous and non-dangerous animals. In this broad distinction the Commissioners see "a great deal of common sense,"[6] but it is very difficult to understand where this common sense lies today. Since the present categories of animal liability became

[1] Law Com. No. 18.
[2] The Report of the Committee on the Law of Civil Liability for Damage done by Animals, Cmd. 8746, 1953.
[3] Cmnd. 2185, 1963.
[4] G. L. Williams, *Liability for Animals*, 1939.
[5] [1947] A.C. 341.
[6] para. 14.

established, the advent of fast-moving motor traffic has created a range of situations in which failure to control animals on the highway exposes members of the public to hazards quite as great as those for which "dangerous" animals may be responsible. The cow wandering from an ill-fenced field out into a busy road is just as serious a menace to society as a lion escaping from Longleat; and it is difficult to support any classification which does not recognise this. Similarly, even within the class of non-dangerous animals, changing situations have exposed inadequacies in the old categories. Lord Greene M.R. drew attention to this in *Hughes* v. *Williams*,[7] when he noted that[8]:

> "A farmer who allows his cow to stray through a gap in his hedge onto his neighbour's land, where it consumes a few cauliflowers, is liable in damages to his neighbour but if through a similar gap in the hedge it strays onto the road and causes the overturning of a motor omnibus, with death or injury to thirty or forty people, he is under no liability at all."

It is true that the Commissioners want to change this situation to the extent that the farmer may be liable in negligence in respect of the road accident, while remaining strictly liable for the cauliflowers. But even so the anomalous distinction prevails. It does not necessarily follow from what has been said that strict liability ought to be imposed in respect of animals straying onto the highway; it simply is that other categories of strict liability are difficult to justify if it is not.

Why is it that the Commission has concentrated its attention upon the details and preserved a general framework which has so little to commend it? It is not credible that the Commissioners could have buried themselves so deeply in the details that the defects of the general structure escaped them, although at no stage in the Report is the possibility of imposing *either* liability in negligence *or* strict liability right across the board squarely considered. These possibilities are mentioned indirectly at several stages in the Report, but nowhere are the arguments comprehensively rehearsed. It may be that a realistic appraisal of what could be put through Parliament is at the bottom of this, it being considered that the existing areas of strict liability should be left well alone and as much as possible done elsewhere by extending the ambit of negligence. If this is so, we should at least have been told what the Commission considers the optimum solution to be, even if it believes this to be presently unobtainable. It should not be the Commission's function to undertake extensive research simply to patch up a defective structure; it would have been better to have reintroduced the Highways (Straying Animals) Bill, and left the rest to a more favourable occasion.

[7] [1943] K.B. 574.
[8] At p. 576.

Whatever the merits of the Report as a whole, most attention is bound to be focused upon the way in which the Commission has dealt with *Searle* v. *Wallbank*. In association with the recommendation that the general negligence principle should remain undisturbed, the Commission proposes (subject to some qualifications relating to common land) the introduction of liability in negligence in respect of animals straying onto the highway. The rule in *Searle* v. *Wallbank* has been criticised often enough in the past, and evidence collected by the Commission confirms that there is good reason for a renewed attack upon it, as in some parts of the country animals are involved in more than one out of every ten road accidents reported to the police.[9] However, the introduction of the normal rules of negligence into this area is far from an ideal solution, as the ability to participate in negligence litigation is a very uncertain benefit to bestow upon the injured road user. The hazards of this means of seeking compensation are well known, and have recently been ably re-emphasised both by Professors Elliott and Street in their book on *Road Accidents*,[10] and in the Report of the Royal Commission on Compensation for Personal Injury in New Zealand.[11] When the details of the proposal are considered, the position of the injured road user appears even less favourable than at first sight. The Commission does not take the view that simply to allow an animal to stray off land onto the highway should in itself necessarily be a sign of negligence. This is made clear in the draft Bill, published with the Report, which enumerates the following factors for the court to take into account in determining the requisite standard of care in a particular case [12]:

(a) the nature of the land and its situation in relation to the highway;
(b) the use likely to be made of the highway at the time the damage was caused;
(c) the obstacles, if any, to be overcome by animals in straying from the land onto the highway;
(d) the extent to which users of the highway might be expected to be aware of and guard against the risks involved in the presence of animals on the highway [13];
(e) the seriousness of any such risk and the steps that would have been necessary to avoid or reduce it.

While these considerations are simply intended as guides to assist the tribunal in determining whether there has been a failure to

[9] See note 75 to para. 87 of the Report.
[10] D. W. Elliott and Harry Street, *Road Accidents*, 1968.
[11] Compensation for Personal Injury in New Zealand, Report of The Royal Commission of Inquiry, December 1967; (1968) 31 M.L.R. 544.
[12] Cl. 8 (2).
[13] Does this part of the clause mean that persons familiar with a particular locality (and therefore aware of the places in which animals are likely to be encountered) will be expected to exercise a higher standard of care than those who are not?

take reasonable care, they will inevitably be useful devices in the hand of the defendant as he seeks to dispel the inference of negligence, and it is hard to avoid the conclusion that their presence in the Act, if passed, will make the task of the plaintiff immensely more difficult. It is questionable whether this is desirable when one remembers the existing difficulties and uncertainties which the plaintiff has to face in a negligence action. The plaintiff is, moreover, not the only person who must be considered here; the complication of the factual inquiry which the provisions contemplate will slow up and render more expensive the whole judicial process in these cases. If this clause was omitted, it would be sufficient in most cases for the plaintiff to prove the animal's escape from the control of the defendant and its involvement in the accident; the maxim *res ipsa loquitur* would usually do the rest. Would this be so unfair to the defendant? [14]

It is probable that this limited imposition of liability in respect of animals straying upon the highway is the very utmost which the Law Commission feels could be pushed past the N.F.U. lobby in Parliament, and that more adequate protection for road users had to give way to this consideration.[15] Even so, as the Commission acknowledges, the form of liability contemplated will make it necessary for the prudent farmer to take out insurance against the risks involved. This will obviously be a bitter pill for some to swallow, and it is rendered even more unpalatable by its uncertain effects, as the insurance companies consulted by the Commission have declined to forecast premiums in advance on the basis of the limited statistical information available. It has long been known, however, and recent research only goes to confirm this,[16] that the necessary cover could be organised far more cheaply under a national scheme than through private insurance. The Government should consider this (there might be considerable advantage in avoiding the entry of private insurance into this area from the very beginning), it is also likely that a public scheme in this area would attract a good deal of support from farmers. If the Government does not take the initiative, the N.F.U. would do well to consider the relative costs of the different means of securing cover before it mounts its next lobby.

Where an animal strays onto the highway after being lawfully placed on common land abutting it, the Commission concludes that the imposition of civil liability on the owner of the animal would be inappropriate. However, evidence published in the Report shows where the answer to this problem lies. Figures provided by the

[14] Particularly in view of the fact that he will probably find it necessary to insure against liability in negligence anyway: see para. 58 of the Report.

[15] It does appear, though, from para. 34 that the N.F.U. is reconciled to some degree of change in this area of the law.

[16] See, for example, Elliott and Street, *Road Accidents*, and the recent New Zealand Royal Commission Report.

Hampshire and Isle of Wight Constabulary reveal that accidents involving animals have been virtually eliminated along the stretch of the A31 between Cadnam and Ringwood in the New Forest by a very modest fence erected by the Ministry of Transport.[17] One lesson here is that the Ministry and local authorities (according to the classification of the road) should be required to fence common land abutting busy highways. Another is that, contrary to the view often expressed by farmers, a very simple fence can effectively contain most horses and cattle. The latter point surely justifies the imposition of a more severe standard of care in *Searle* v. *Wallbank* situations than that advocated by the Commission.

What has been said in the preceding paragraphs leads naturally on to issues of a more general nature. The problems with which the Commission was faced in connection with liability for animals are common to many other areas of civil liability, and for this reason it must be hoped that the Commission's conservative approach towards animals is not indicative of its approach towards civil liability as a whole. Finally, pleas in favour of a general reconsideration of the operation of civil liability are being increasingly frequently heard,[18] and until future developments in this direction are clearer, it must be doubted whether it is worth while for the Law Commission to use up its valuable energy constructing detailed reforms in isolated areas of the law.

SIMON ROBERTS.

[17] para. 88.

[18] The most recent and forceful of these pleas is made in the Report of the Royal Commission on Compensation for Personal Injury in New Zealand, but they are heard also in quite conservative quarters; see, for example, the address by Lord Parker C.J. published in [1965] 8 C.L.J. 1.

NOTES OF CASES

GOING THE WHOLE HOGG *v.* CRAMPHORN?

FIVE principles of company law interlock in an inelegant manner. This relationship has never been fully investigated by the courts; but in *Bamford* v. *Bamford*,[1] Plowman J. began to unravel their twisted skein.

The principles are: (i) The memorandum and articles constitute a contract under section 20 of the Companies Act 1948; and therefore each individual member can sue to assert his personal rights *qua* member. (ii) He cannot sue, however, where the matter is within the control of an ordinary majority in general meeting by reason of the rule in *Foss* v. *Harbottle*; and, therefore, he cannot normally challenge mere "procedural irregularities"[2] or mere breaches of fiduciary or other duties by the directors,[3] or even acts by them that are merely in excess of their powers, which can be so ratified.[4] Such breaches of duty are said to be wrongs done to the company for which it alone can sue. (iii) Although residual powers of control are still regarded by the courts as belonging to the general meeting (as illustrated by (ii)) nevertheless when the articles delegate powers to directors the general meeting cannot interfere with the exercise of those powers[5] (although it is not clear how far this principle extends to the right to control corporate litigation). (iv) The shareholder's personal right of action probably extends to a right to have the constitution (memorandum and articles) generally observed,[6] a right which is limited by principle (ii), but as yet limited to an uncertain extent. (v) The individual shareholder can bring in representative form a "corporate" or "derivative" action to protect his company's rights against wrongdoers who are in control and have committed a "fraud"; these "frauds" are not open to ratification or approval by an ordinary majority[7]; but again the ambit and definition of "fraud" is uncertain.

It had been once thought that where directors had acted for a "collateral purpose" although honestly, principle (v) would apply and ratification was not possible.[8] *Hogg* v. *Cramphorn Ltd.*,[9]

[1] [1968] 2 All E.R. 655.
[2] *McDougall* v. *Gardiner* (1875) 1 Ch.D. 13.
[3] *Pavlides* v. *Jensen* [1956] Ch. 565.
[4] *Grant* v. *U.K. Switchback Rys.* (1888) 40 Ch.D. 135; *Irvine* v. *Union Bank of Australia* (1877) 2 App.Cas. 366, 373–374 (P.C.).
[5] *Shaw (John) & Sons (Salford) Ltd.* v. *Shaw* [1935] 2 K.B. 113, and the line of cases leading to it: see Gower, *Modern Company Law*, p. 127.
[6] *Salmon* v. *Quin & Axtens Ltd.* [1909] 1 Ch. 311; affd. *Quin & Axtens Ltd.* v. *Salmon* [1909] A.C. 442 (H.L.): and see Wedderburn [1957] Camb.L.J. 194, 207–214.
[7] *Cook* v. *Deeks* [1916] A.C. 554 (P.C.).
[8] Gower, *Modern Company Law*, p. 512.
[9] [1967] Ch. 254 (1968: Buckley J.).

however, demonstrated that this was not the case. Although a minority shareholder could sue to challenge such acts (there the issue of new shares to retain control for the directors), his action might be ultimately defeated because the court would send the matter back for a decision by the general meeting. In a previous note, it was suggested that *Hogg's* case involved a "corporate" action, the writ being in representative form; and that therefore the decision represented an exception to the rule in *Foss* v. *Harbottle* and the principles set out above.[10] *Bamford* v. *Bamford* [11] suggests that the exception may be of a slightly different character, though the result was the same.

Bamford's case also involved directors who issued ordinary shares previously unissued. This they were given express power to do by article 12 of the company's constitution. Two shareholders (suing in a representative action) alleged that the directors had not exercised the power bona fide in the best interests of the company. At a general meeting the issue of the shares was approved but the plaintiffs alleged that such a ratification was invalid. Plowman J. assumed for the purposes of this preliminary issue that the allegation was correct that the directors did not exercise their power of allotment bona fide in the interests of the company but he made it clear that the "assumption is merely that the board exceeded its powers not that it acted mala fide." [12] The case was, therefore parallel to *Hogg* v. *Cramphorn Ltd.* Plowman J. was disposed to agree with that decision but went into the problems more deeply because they had been more fully argued.

His lordship first sets out the cases that clearly establish principle (iii), which he states as follows:

> "A company cannot by ordinary resolution dictate to or over-rule the directors in respect of matters entrusted to them by the articles. To do that it is necessary to have a special resolution." [13]

[10] See (1967) 30 M.L.R. 77, where other authorities are cited which are not repeated in this note. The "collateral purpose" was the same as that alleged in *Bamford*, an attempt to retain control in the face of a take-over bid. It was clear that, under the old law, the courts would not interfere with directors' acts short of "fraud" at the suit of minority shareholders: see *Bailey* v. *Birkenhead, Lancs. & Cheshire Junction Ry.* (1850) 12 Beav. 433 (allegation of unfair calls made for improper motives; action in representative form; Lord Langdale M.R. ". . . it would, I think, be impossible for this court to entertain jurisdiction in such a case as this without assuming authority to interfere in the internal management of all companies and partnerships . . ." p. 442): and *Anglo-Universal Bank* v. *Baragnon* (1881) 45 L.T. 352 (C.A.): although there is a hint in that case that action might be permitted in some cases of improper motive.

[11] [1968] 2 All E.R. 655.

[12] The case was thus not in the same category as *Re Roith Ltd.* [1967] 1 All E.R. 427; noted (1967) 30 M.L.R. 566. On "collateral purposes" where the directors were bona fide see also the Report on the Savoy Hotel Dispute (Milner Holland, Q.C., 1954, H.M.S.O.).

[13] [1968] 2 All E.R. at p. 662.

But this was not, in his view, what the resolution had tried to do in *Bamford's* case. It did not control or dictate to the directors concerning the exercise of a power given them by article 12. But even so, argued counsel for the plaintiffs, that power was a fiduciary power; and to allow the general meeting to exercise it, or validate its use, altered the *character* of the decision, because directors must consult the interests of the company whereas shareholders can consult their own interests.[14] The defendants agreed that (subject to provisions in the articles) the power to issue capital lay, like other powers, residually in the general meeting. Article 12 merely gave the directors a delegated power to issue shares subject to the limitation that they must act in the best interests of the company. But if the board exceeded that limitation on its power, a general meeting could validate this action by virtue of its wider residual power so long as such a resolution did not conflict with the articles.[15] Plowman J. accepted those arguments which he thought, derived support from such cases as *Grant* v. *U.K. Switchback Rys.*[16] and *Irvine* v. *Union Bank of Australia*[17] (cited above in support of principle (ii)). Those cases showed that an excessive use of limited powers to sell property or borrow by directors can be ratified by the general meeting: He went on:

> "I accept however that they are not of themselves decisive of the question whether, whenever a limited power is conferred on directors, a residual power is necessarily left in the company. Whether any such residual power does or does not exist in any particular case will depend not only on the general law but also on the memorandum and articles of association of the company in question."[18]

Here nothing in article 12 limited the residual power of the general meeting, which was therefore capable of validating the issue of shares.

Two points of clarification emerge from the *Bamford* judgment. First it is now confirmed that acts done by directors honestly but for a "collateral purpose" can normally be ratified by the general meeting by virtue of the latter's residual powers. (This insistence upon the residual powers still enjoyed by the general meeting may go some way towards solving the problems that remain concerning

[14] One short answer to this point might have been that since the phrase "interests of the company" here means, in English law, the interests of the *shareholders* as a whole, no change in the character of the decision could be detected.

[15] As it did for example in *Quin & Axtens Ltd.* v. *Salmon* [1909] A.C. 442 (H.L.).

[16] (1888) 40 Ch.D. 135. It may be noted that in this case the limitations amounted to an express statement in the articles of what amounted to their fiduciary duties, while in *Irvine's* case, *infra*, the limitation went to the nature of the transactions in which they could engage. I am indebted to Mr. B. Slutsky for the suggestion that this distinction may later become important.

[17] (1877) 2 App.Cas. 366 (P.C.).

[18] [1968] 2 All E.R. at p. 668.

control of corporate litigation and lend support to the idea that the normal articles of association allow either the directors or the general meeting to initiate such litigation.[19]) Secondly, this application of principle (ii) is, however, limited by the proviso that there must be nothing in the memorandum or articles to exclude such residual powers. If the articles explicitly do exclude the general meeting's residual powers, the directors' powers on the matter in issue are exclusive, within principle (iii). An improper use by the directors of their powers cannot, according to the tenor of Plowman J.'s judgment, be cured by ratification in such a situation.

If that situation did arise it would become interesting to ask whether the minority shareholder could then sue successfully. The logic of both the *Hogg* and *Bamford* judgments is that he might do so despite the fact that directors owe their duties only to the company and not to the shareholders. Of course, such a result need cause no surprise if the plaintiff's action is a "corporate" action brought to enforce the company's rights; and that seemed to be a possible interpretation of the action brought in *Hogg's* case. But it does not seem to be true of *Bamford*. In both cases the company was joined as a party and the plaintiff sued in representative form on behalf of himself and all other shareholders; but, as is well known, these formalities are common both to a "corporate" action and to a "personal" action (where the representative form of the writ merely shows a common interest of all the allegedly injured shareholders). In *Bamford* there seems little doubt that both counsel and Plowman J. dealt with the action as a "personal" one which not merely fell within principle (i) but also illustrated principle (iv).

Thus Plowman J. stated with approbation the plaintiffs' first argument:

> "The articles of a company constitute a contract binding on the company and all its members and each member is entitled as against the company and every other member to require *that the affairs of the company shall be conducted according to the articles for the time being in force*. This proposition is merely an exegesis of section 20 (1) of the Companies Act 1948. Its purpose is to demonstrate that the plaintiffs are suing in respect of their own individual contractual rights and that the rule in *Foss* v. *Harbottle*[20] is therefore excluded (see *Edwards* v. *Halliwell*).[21] This proposition is not challenged by the defendants."[22]

The words italicised are for more than an "exegesis" of the Act; they constitute an enlargement of the minority's contractual rights

[19] See *Danish Mercantile Co. Ltd.* v. *Beaumont* [1951] Ch. 680.
[20] (1843) 2 Hare 461.
[21] [1950] 2 All E.R. 1064 (C.A.).
[22] [1968] 2 All E.R. at pp. 659–660 (italics supplied). It is to be noted how the words in italics are almost identical to the formula used by Jenkins L.J. and Romer L.J. in *Re Harmer* [1958] 3 All E.R. 689, 704, 706.

by adding principle (iv) to principle (i). *Bamford's* case adds further authority to the view that principle (iv) is correct.[23] In so doing it also clarifies the limits to be placed upon principles (i) and (iv) by virtue of principle (ii). The problem here has always been how to recognise a situation where although the articles have been infringed, the shareholder nevertheless cannot bring his action to have the articles observed because of some special limit placed upon the general right by one limb of the rule in *Foss* v. *Harbottle*. According to the judgment in *Bamford* the minority shareholder cannot, it seems, bring a successful action if either the matter is a "procedural irregularity" or the like which the ordinary majority in general meeting can validate or the matter concerns some other impropriety (such as a breach of duty by the directors) which the general meeting has power to ratify and *does ratify* (either in advance as in *Bamford* itself, or, subsequently on a reference from the court, as in *Hogg*). The new element in this way of stating the rule is the insistence upon actual ratification rather than the mere possibility of it. The ordinary principle has so far been that a minority shareholder has no *locus standi* to bring an action wherever it is possible for the ordinary majority to ratify (with the exception of the "derivative" or "corporate" actions under principle (v)). That was the principle applied in *McDougall* v. *Gardiner*,[24] even though there had been a breach of the articles. Similarly, in the ordinary cases of directors' breach of duty, the possibility of ratification by the general meeting has been enough to deprive the minority member of his *locus standi* as plaintiff.[25]

The curiosity of the new principle is that it increases the procedural opportunities of the minority shareholder, by allowing the action to be brought where previously he could not have cleared the first hurdle of *possible* ratification; but gives the same plaintiff little chance of ultimate success since the result turns on whether the general meeting does or does not validate the acts of directors who can so often manipulate the votes to secure a majority. As we have seen, if ratification were not to take place, the minority plaintiff might now have a new opportunity to stop managerial improprieties. But, in the case of directors' fiduciary duties, this again produces a curiosity. For it is trite law that directors owe such duties not to the shareholders but to the company alone. Yet the shareholder might, it seems, now stop breaches that take the form of acts done for "collateral purposes." Why then, it may be asked in future cases, should he not also be allowed *locus standi* to prevent (subject again to *actual* ratification) breaches which involve "secret

[23] For earlier authorities see [1967] Camb.L.J. 194 and (1965) 28 M.L.R. 347; see too *Kraus* v. *Lloyd Pty. Ltd.* [1965] V.R. 282. It is to be noted that in *Bamford's* case Plowman J. quoted extensively from *Salmon* v. *Quin & Axtens Ltd.* [1909] Ch. 311 which was the first clear modern illustration of the principle.

[24] (1875) 1 Ch.D. 13.

[25] As in *Pavlides* v. *Jensen* [1956] Ch. 565.

profits" and the like, or indeed the breach of any fiduciary duty? Yet, here again (except for the narrow area of principle (v)), the company to which the duties are owed has always been seen as the proper plaintiff, under the other limb of the rule in *Foss* v. *Harbottle*.[26]

In one respect, the *Hogg* judgment may be thought preferable to that in *Bamford* since it seems to treat actions of this kind as "corporate" actions. It may be parenthetically noted that a personal action may not be framed in a representative form (although the writ frequently is so drawn); nor is it subject to the special equitable rules such as the need to come with "clean hands," the need to have owned the shares at the time of the wrongdoing, or even the need to join the company as a party (although, again, this is often done). Nevertheless, despite the difficulties involved in treating such actions as "personal," the *Bamford* judgment is to be welcomed as a step towards clarification of the individual shareholder's contractual rights and the limits placed upon them. It also serves to indicate that principle (iv), which a decade ago was rarely if ever considered to be a principle of company law, has quietly gained acceptance by both the Bar and the judiciary.

K. W. Wedderburn.

Confessions—Controlling the Police

The recent case of *R.* v. *Northam*[1] is of interest because of the light it sheds on the policy underlying the rules regulating the admissibility of confessions. In that case the appellant, when on bail and awaiting trial at Brighton quarter sessions for breaking and entering, was arrested by the police as a suspect in another breaking and entering at Westfield. Northam was desirous of returning to his wife as she was pregnant and unwell. Such would not have been possible, however, if a separate charge were laid with respect to the Westfield offence as Northam would then have been remanded in custody. When questioned by the police with respect to the Westfield offence Northam inquired whether or not the police would have any objection to this offence being taken into consideration at his forthcoming trial at Brighton quarter sessions. The police intimated that they would have no objection.[2] Northam then made a confession with respect to the Westfield breaking and entering. The police, for some undisclosed reason, decided to prosecute separately for the Westfield offence and the confession made by Northam was admitted in evidence. The Court of Appeal (Criminal Division) quashed Northam's conviction on the grounds

[26] On the origins of the two "limbs" of the rule, see [1957] Camb.L.J. 194, 196–198.

[1] (1968) 52 Cr.App.R. 97.

[2] On the nature of this procedure, see Jackson, *Machinery of Justice in England* (4th ed.), at p. 212.

that the confession had been improperly admitted. On the facts this decision is unexceptionable. An offer of police willingness to recommend that certain offences be taken into consideration obviously constitutes an offer of clemency.[3] What is of note in *Northam* is the novel formulation of the rule regulating the admissibility of confessions. In the course of giving judgment Winn L.J. stated that there was,

> "a distinction . . . to be kept in mind always between inducement [*sic*] by persons not in authority, with regard to which the proper test . . . must be whether a confession was in fact induced, whether there had been a persuasion of the will of the individual to make such a confession, whereas in the case of inducements by persons in authority, in particular police authority, the question was, was any offer or promise made which was capable of constituting an inducement, as distinct from one which in fact induced?"[4]

The *locus classicus* on the admissibility of confessions is, of course, *R.* v. *Ibrahim*[5] where Lord Sumner stated that before a confession is admissible in evidence it must be proven to be a "voluntary statement in the sense that it has not been obtained . . . either by fear of prejudice or hope of advantage held out by a person in authority." The application of this test requires the court to determine (1) whether the confession was preceded by conduct "capable of being an inducement" and (2) if so, did the accused in "actual fact feel moved to make his statement always remembering it is for the prosecution to prove that the inducement did not affect him."[6] This latter burden of proof could be satisfied by showing that at the time the accused confessed the inducement had expended itself[7] or, more rarely, that the inducement did not operate at all on the mind of the accused.[8] The above test, which on authority appears to be the better view, differs from the *per se* rule of exclusion as formulated by Winn L.J. by which a confession would be automatically excluded once evidence of some inducement is produced.

[3] In *Northam* itself Winn L.J. recognised that a "certain discount of a substantial amount is in practice allowed in respect of cases which are taken into consideration as distinct from those which are the substantive foundations of indictments," at p. 105.

[4] (1968) 52 Cr.App.R. at p. 103. This is a reiteration of the learned judge's position in *R.* v. *Richards* [1967] 1 W.L.R. 558.

[5] [1914] A.C. 599, 609 (P.C.). Approved by the House of Lords in *R.* v. *Hars and Power* [1967] 2 W.L.R. 297.

[6] *R.* v. *Cleary* (1963) 48 Cr.App.R. 116; *Archbold* (36th ed.), at para. 115.

[7] *See e.g.*, *R.* v. *Smith* [1959] 2 Q.B. 35.

[8] Situations are foreseeable, however, where such an argument would be tenable. For example, X, a suspect wanted by the police, walks into a police station with a prepared confession in his pocket which he intends handing over to the police officer in charge. Before he has an opportunity to do so he is threatened by a police officer. X then hands over his previously prepared confession. In this situation an inducement has been held out but a plausible argument could be advanced that it did not induce the confession. *Cf. R.* v. *Barker* [1941] 2 K.B. 381.

The difference between these tests may, however, be at best solely verbal. Normally, at the *voir dire* the questions of whether an improper inducement was held out and whether or not such inducement actually brought about the confession will be fused. Also, if the existence of an improper inducement is proved an onerous burden rests on the prosecution to show that it was not a factor influencing the accused to make a confession. This may mean that for all practical purposes confessions will be excluded once an improper inducement is shown to exist.[9] Coupled with this is the difficulty of evaluating the impact of an inducement on the mind of a confessor. This requires not only a re-creation in court of the circumstances surrounding the taking of the confession and an assessment of their impact on the mind of the confessor but, in addition, the individual emotional and mental idiosyncrasies of each confessor have to be taken into consideration as "not all accused are reasonable men or women: they may be very ignorant or terrified by the predicament in which they find themselves."[10] This problem is aggravated by the fact that there is a gap in our knowledge as to what actually occurs inside police stations—a gap which is normally unsatisfactorily filled by a swearing contest between the accused and the police as to what transpired. For the above reasons the test of admissibility as formulated by Winn L.J., while not representing the theory on which the courts admit confessions, may more accurately reflect judicial practice.

An interesting consequence of the formulation of Winn L.J. is that it will more than ever concentrate judicial investigation, when ruling on the admissibility of confessions, on the investigatory practices of the police. Winn L.J. in distinguishing between confessions made to persons in authority and persons not in authority may have been merely prompted by a realistic assessment of the likelihood of oppressiveness when confessions are made in the former situation. This, however, is not a justifiable basis for formulating different rules but should merely be a factor to be taken into consideration when deciding whether or not the confession was induced. While Winn L.J. did not overtly state that one of the purposes of his formulation was to control police conduct he fully appreciated that his decision would have some impact on the "efficient performance by the police of their duties."[11] The degree to which this will happen will be dependent upon the definition given to the concept of inducement.

In one sense an inducement will always be present where a confession is made in response to police questioning or as a consequence of police investigation. Theoretically, the only situation in which all taint of any inducement is absent is where the confession is spontaneous in the sense of being the product of internal mental

[9] See Nokes, *Evidence* (4th ed.), at p. 306.
[10] *R. v. Hars and Power* [1967] 2 W.L.R. at p. 306.
[11] (1968) 52 Cr.App.R. at p. 108.

pressures. The adoption of such a definition of inducement would, however, greatly circumscribe the scope of legitimate police investigation as routine investigatory practices would then be categorised as prohibited inducements. The courts in deciding what constitutes a prohibited inducement have been sensitive to this problem. For example, it has been held that a request by the police to accompany them to the police station while constituting "some inducement in the colloquial sense . . . is not a sufficient inducement in law to render inadmissible a statement resulting from it." [12]

In a number of recent decisions the courts, however, have articulated extremely minimal standards as to what constitutes an inducement. In *R.* v. *Smith*, Lord Parker C.J. considered that even "the most gentle, if I may put it that way, threats or slight inducements will taint a confession." [13] The same learned judge in *R.* v. *Wilson* was of the opinion that even a "slight inducement" held out by a person in authority could operate to exclude a confession.[14] In *R.* v. *Richards*,[15] Winn L.J. himself considered that "any kind of inducement made by a person in authority will make the statement inadmissible." The adoption of such minimal criteria in determining what constitutes an inducement would greatly limit the scope of legitimate police investigatory practices.

What is of importance is to realise that the definition given to the concept of inducement will be dependent upon the purpose or purposes of the rule excluding confessions. If the purposes are seen to be those of Lord Reid in *R.* v. *Harz and Power*,[16] namely, to guarantee credibility and to protect the accused's privilege against self-incrimination, then greater will be the tendency to define inducement in terms of the subjective mental processes of the accused. The more the purpose of the rule excluding involuntary confessions is seen as the control of police conduct, then greater will be the tendency to define inducement objectively in terms of police conduct. Until there is an accepted consensus on the policy underlying the rule regulating the admissibility of confessions there will be no uniformity in the way in which the rule of exclusion is formulated. It is to be hoped that this clarification will be provided by the Criminal Law Revision Committee which presently has the topic of confessions and admissions under advisement.

D. D. Prentice.

[12] *Per* Slade J. in *R.* v. *Joyce* [1968] 1 W.L.R. 140, 142. This part of the decision was in all probability unaffected by the decision in *R.* v. *Harz and Power*, *supra*.
[13] [1959] 2 Q.B. 35, 39.
[14] [1967] 2 W.L.R. 1094, 1100 (C.A.).
[15] [1967] 1 W.L.R. 653, 655. *Cf. R.* v. *Priestly* (1966) 50 Cr.App.R. 183 which Winn L.J. in *Richards* did not consider to be "wholly consonant" with prior authorities.
[16] [1967] 2 W.L.R. at p. 306.

Dismissal of Action for Want of Prosecution

In three recent cases [1] the Court of Appeal appears to have adopted a new and, on the whole, stricter attitude in situations where there is inordinate delay in the prosecution of an action and an application is made by the defendant that it be dismissed for want of prosecution. In (1) *Allen's* case the action (arising out of a fatal industrial injury) was begun in 1960: by 1967 no summons for directions had been issued and the defendants had already lost their chance to make a claim against sub-contractors. In (2) *Bostic's* case a nurse had first complained in 1958 about an injury which, she alleged, had arisen in the course of her employment: the writ was issued in 1961 and by 1967 the defence had not been delivered. Finally, in (3) *Sternberg's* case, which involved rather more complicated indemnity claims and, also, allegations of fraud, conspiracy and professional negligence, the original transactions giving rise to the dispute had occurred by 1954; the action was begun in 1960; by 1967 the case had not been set down for trial. In cases (1) and (3) the delay was due to prolonged inactivity on the part of the plaintiffs' solicitors (or their clerks) which was said to amount to negligence. In case (2), although some of the delay was attributable to the plaintiff's side, the defendants' position had been weakened by their own dilatoriness (not mere inactivity). For these and a number of other reasons, actions (1) and (3) were dismissed and the plaintiffs were told that they had their remedy against their own solicitors; action (2) was allowed to proceed.

There are only a small number of reported cases that have a direct bearing on outright dismissal for want of prosecution and its consequences.[2] Among these, the *Allen*, *Bostic* and *Sternberg* cases are particularly important because in them the Court of Appeal explains the principles applicable at some length. While it may be rash to assert that the court has actually changed the law, a new trend in the exercise of judicial discretion in the face of an admittedly special type of situation is discernible.

In the past, the picture [3] gained from a number of cases reported

[1] *Allen* v. *Sir Alfred McAlpine & Sons Ltd.*; *Bostic* v. *Bermondsey and Southwark Group Hospital Management Committee*; *Sternberg and Another* v. *Hammond and Another* [1968] 2 W.L.R. 366; [1968] 1 All E.R. 543.

[2] Prior to the cases under consideration the C.A. had ordered the outright dismissal of the action in at least two decisions, both of March 1967: *Reggentin* v. *Beecholme Bakeries Ltd.* (1967) 111 S.J. 216; [1968] 1 All E.R. 566, and *Fitzpatrick* v. *Batger & Co. Ltd.* [1967] 1 W.L.R. 706; [1967] 2 All E.R. 657. The applications to dismiss in the present cases were made at the time of, or soon after, the C.A.'s decisions in *Reggentin's* case and *Fitzpatrick's* case. More recently the C.A. dismissed the actions in *Clough and Others* v. *Clough and Others* [1968] 1 All E.R. 1179, and in *Browne's* case, *The Times*, May 17, 1968. For another case, where the application to dismiss failed, see *Marlton and Another* v. *Lec-Leviton and Another* [1968] 2 All E.R. 874. On dismissal and *res judicata*, consider *Pople* v. *Evans* [1968] 2 All E.R. 743 (not involving inordinate delay).

[3] To complete a more general picture on the delays of justice one would have to allow for the cases on dismissal that have not been reported; and also for

on the point of dismissal for want of prosecution[4] was that, when a master or judge was faced with an application to dismiss, he would normally order that the action should stand dismissed unless the next (or a prescribed) step in the proceedings were taken within a specified time; thus the dilatory party would expect to be given a chance to put his house in order. On the other hand, many if not all of these cases involved shorter delays, such as could not be described as inordinate, and can be distinguished from the cases under consideration on this ground.[5]

In the present cases the Court of Appeal in effect laid down that when the following conditions are satisfied judicial discretion should normally be exercised in favour of an outright dismissal:

(a) The delay for which the plaintiff's side is responsible must be inordinate. It is undesirable to lay down any precise line. This will vary from one case to another "but it should not be too difficult to recognise inordinate delay when it occurs" (Salmon L.J.).

(b) The delay must be inexcusable.[6] It must not have been waived, or brought about, by the defendant. Mere inactivity on the part of the defendant will not normally excuse a plaintiff (or his legal advisers). It is a basic rule of the present adversary system in civil litigation that the plaintiff's side bears the primary responsibility to proceed with the case. A proper weapon against an inactive defendant is judgment in default (Diplock L.J.).

(c) The delay must be such as seriously to prejudice the chances of a fair trial, to the detriment of the defendant and of justice generally. The duration of the delay may itself be evidence of such prejudice; the proof of facts may depend on oral testimony; or the defendant may have a good case for contribution or indemnity against a third party which it is now too late to assert.

(d) There must be no other circumstances relevant to the exercise of judicial discretion and requiring a different conclusion.[7] The court should consider, *inter alia*, whether the delay was due to the plaintiff personally[7] or, as is more usual, to the fault of his solicitor; whether in this case the solicitor is solvent enough (or

the large number of protracted, day to day, cases that have proceeded to judgment and where an application to dismiss for want of prosecution is not known to have been made. *Cf. Smith* v. *Leech Brain* [1961] 3 All E.R. 1159 (over eight years between death and judgment).

[4] *e.g.*, the cases in 30 E. & E. Dig. (Repl.), pp. 164–165; with few exceptions these cases were decided in the nineteenth century.

[5] See Jessel M.R. in *Eaton* v. *Storer* (1882) 22 Ch.D. 91.

[6] Some delay pending the ascertainment of the extent of the damage, especially in personal injury cases, is not inexcusable; an alternative course, however, for which there is some procedural machinery, is to conduct the proceedings in two stages, one on liability and the other, later stage, on damages (Salmon L.J.). See R.S.C., Ord. 33, r. 4 (2); the proposals in *Trial of Motor Accident Cases*, a report by JUSTICE, London, 1968, paras. 22–28; the Winn Report on Personal Injuries Litigation, Cmnd. 3691, Nos. 85–88, 96, 230 (referring to R.S.C., Ord. 14) and 485–495 (esp. 494); and for a different approach, *cf.* R.S.C, Ord. 15, r. 16.

[7] *e.g.*, *Zimmer Orthopaedic Ltd.* v. *Zimmer Manufacturing Co.* [1968] 2 All E.R. 809 (counterclaim).

insured) to meet a claim for damages from his client; and the conduct of the defendant's side (other than mere inactivity), as in case (2). It should then, if necessary, strike a balance between any hardship to the plaintiff resulting from dismissal (especially if the period of limitation has expired) and the prejudice to the defendant and to justice resulting from more delay, always giving due weight to the basic rule stated above, under (b).

To the objection that to strike out a man's action without trial offends against the Magna Carta, because he is being deprived of his right to come before the courts, Lord Denning's answer is that "the delay of justice is a denial of justice." One might add that, legally, the Court of Appeal's position is covered by the Rules of Court[8]: to challenge these as *ultra vires* the enabling statute would not be an easy task.[9]

The policy of the Court of Appeal is consistent with the public interest in the fair and speedy administration of justice and with the philosophy which underlies the limitation legislation.[10] The court hopes that its determined attitude, and the rule that an innocent plaintiff whose action is dismissed can have his remedy against his negligent solicitor,[11] will induce those responsible for the progress of cases "to get on" with them.[12] This line, although generally desirable, may sound rather drastic *vis-à-vis* such a plaintiff if his solicitor is viewed not as a freely chosen agent[13] but as an officer of the court. It may also sound a little harsh on solicitors whenever (as is often the case in personal injury litigation) the defendant in the dismissed action or his insurers are not co-operative: in this respect, however, it is a by-product of the present adversary system (*supra*, (b)). Given this system, my only reservations relate to the prima facie irrelevant considerations raised (*supra*, (d)) by the Court of Appeal's inquiry into the solvency and insurance cover of the plaintiff's solicitor.[14]

A disappointed plaintiff who wishes to make a claim against his negligent solicitor will normally seek damages for professional

[8] *e.g.*, Ord. 19, r. 1; Ord. 25, r. 1 (4); Ord. 34, r. 2 (2). See also the reference to inherent jurisdiction by Salmon L.J.

[9] But see *Re Grosvenor Hotel, London (No. 2)* [1964] 3 All E.R. 354.

[10] For a reference to limitation, see *Krakauer* v. *Kats* [1954] 1 All E.R. 244.

[11] For another, less defined, remedy, see the Solicitors Act 1957, s. 50 (2). See also the Solicitors Acts 1965, s. 11, and 1957, Sched. 1, as amended: and R.S.C., Ord. 62, r. 8 (1).

[12] "Once it is generally recognised" what the consequences of "inordinate and inexcusable delay" are likely to be "there will . . . be a remarkable improvement—an improvement which it has apparently been impossible to achieve by any other means"; and "a stricter view may now be taken of delays occurring after the recent decisions than of delays occurring before them" (*per* Salmon L.J.). On the evils of delay and suggested remedies, see also the JUSTICE report, *supra*, paras. 40–48 and App. 1. See also the criticism of the present rules in *Wales* v. *Wales and Another* (1967) 111 S.J. 946 (10 years between accident and judgment).

[13] See the references to agency by Diplock L.J. and Salmon L.J.

[14] But see, *per* Diplock L.J.: ". . . in exercising a discretion, even a judicial one, the courts can temper logic with humanity. . . ."

negligence.[15] If the claim is not settled the court will have to assess the value [16] of the right that was allegedly lost to the plaintiff. The dismissal order is here not a *novus actus interveniens*, and the onus is on the defendant solicitor to prove that his former client's "claim in the dismissed action would not have succeeded had it been prosecuted with diligence" (Diplock L.J.).[17] Some guidance on assessment can be derived from cases against solicitors arising out of a failure to issue the writ within the limitation period [18] or to put forward a defence.[19] In some of these cases the former client recovered only part of the probable full value of a successful claim (and *mutatis mutandis* for a failure to defend)—presumably because the court was satisfied that his chances of success in the earlier proceedings were not unqualified.

One hopes that this new approach to delay and dilatory solicitors will also do much to improve the image of the profession.

ANDREW DEMOPOULOS.

ESTATE AGENT'S COMMISSION

IN *Jacques* v. *Lloyd D. George & Partners Ltd.*[1] the Court of Appeal considered whether a proposed vendor was liable to pay commission to his estate agent on a sale which had not been completed, where part of the agency agreement read:

> "(8) Should you be instrumental in introducing a person willing to sign a document capable of becoming a contract to purchase at a price, which at any stage of the negotiations has been agreed by me, I agree to pay you a commission of £250 or 7½ per cent. of the selling price, whichever is the greater."[2]

In his judgment Lord Denning M.R. found against the estate agent on two main grounds, one being that as the agent's representative had said to the vendor when he put the agency agreement

[15] The action is one for breach of contract: *Groom* v. *Crocker* [1938] 2 All E.R. 394, 401–402, 413, 418; *Bailey* v. *Bullock* [1950] 2 All E.R. 1167; *Clark* v. *Kirby-Smith* [1964] Ch. 506; [1964] 2 All E.R. 885, referring also to the *Hedley Byrne* case; *Cook* v. *S.* [1968] 1 All E.R. 248; [1967] 1 All E.R. 299. See also the Solicitors Act 1967, s. 60 (4), nullifying certain exception clauses relating to contentious business. For a claim in tort, see *Groom* v. *Crocker* (libel).

[16] No great difficulty appears to arise from *Allen's* case; or from *Sternberg's* case, in connection with the value of the indemnity claim.

[17] Applying *Armory* v. *Delamirie* (1721) 1 Str. 505. See also *Godefroy* v. *Jay* (1831) 7 Bing. 413 (failure to defend).

[18] *e.g.*, *Clayton* v. *Kearsey* (1935) 79 S.J. 180 (nominal damages on account of the improbability of even a favourable judgment being satisfied); *Kitchen* v. *R.A.F. Assn.* [1958] 1 W.L.R. 563; [1958] 2 All E.R. 241; *Yardley* v. *Coombes, The Times*, July 12, 1963; *Gregory* v. *Tarlo* (1964) 108 S.J. 219.

[19] *e.g.*, *Godefroy* v. *Jay*; *Cook* v. *S.*, where the court had *inter alia* to assess the chances of success of a defence and cross-prayer in an earlier, undefended, divorce case.

[1] [1968] 1 W.L.R. 625.

[2] The consideration was to be £2,500. Lord Denning's view was forthrightly expressed. "Can an estate agent insert such a clause and get away with it? I think not" (p. 629).

before him for signature, "If we find a suitable purchaser and the deal goes through, you pay £250," the agent could not escape that misrepresentation by relying on the words of the agreement. The other main ground is composite and is harder to follow.

Lord Denning first objected to the clause because it was "wholly unreasonable and totally uncertain"[3] but he did not indicate whether it was the unreasonableness which would vitiate it or the uncertainty or the two in conjunction. Apart from restraint of trade cases and contracts with infants unreasonableness will only affect a contract where it goes to prove fraud, duress or undue influence. Then Lord Denning said that when an estate agent agrees to find a purchaser for a house "the ordinary understanding of mankind is that the commission is payable out of the purchase price when the matter is concluded"[4] and if no explanation of the agency form is given a client is entitled to assume that the form "does not go beyond the usual understanding in these matters." He then added that in the absence of an explanation the client may assume that the form contains "nothing unreasonable or oppressive." Is this the same thing? A clause may surely divert from the "usual understanding" yet not automatically be unreasonable or oppressive. Which is the test? Lord Denning then said that if a client does not read the form and it is found to contain a clause which is "wholly unreasonable and totally uncertain" (back to the first phrase) it cannot be enforced against the innocent vendor.[5] Apparently the vendor is better off if he signs without reading than if he reads and signs without understanding. Is there one rule for the case where a person reads the agreement but is given no explanation (nothing unreasonable or oppressive and/or no departure from usual terms) and another for the person who neither reads nor is given an explanation (nothing wholly unreasonable and/or totally uncertain)?

If the agreement contains a vitiating clause Lord Denning's view is that the agent could only have his commission "on the usual basis," namely, if the sale goes through.[6] It is settled law that a clause which is so uncertain that it cannot be construed can invalidate a bargain if the parties can be regarded as never having reached a concluded agreement, particularly where the vague clause is fundamental to their bargain.[7] Lord Denning seems to have made new law when he says that the "ordinary understanding of mankind" will import terms into an estate agent's contract so as to put a positive duty of explanation onto the estate agent if he is

[3] [1968] 1 W.L.R. at p. 680. He said that even a blank form with a signature on it is "capable of becoming a contract" when all the blanks have been filled up.
[4] *Ibid.*
[5] *Ibid.*
[6] He did not say what the rate of remuneration should be, whether the rate agreed or a "usual" rate.
[7] *Scammel* v. *Ouston* [1941] A.C. 251.

to avoid having the agency agreement set aside. Lord Denning himself cited no authority for his propositions. This is a very high point of consumer-protection.

The two other judges in the Court of Appeal did not follow Lord Denning's lead and they disagreed to some extent with him and completely with each other in both arriving at the same result. Neither relied on the "ordinary understanding of mankind." Edmund Davies L.J. decided against the estate agent because of the misrepresentation but said that though the clause concerning commission was uncertain in its exact scope and operation he would probably have found it effective had the point stood alone. In this case a binding contract had been made and this situation was covered by the clause despite the fact that there were other possible bizarre interpretations of the words used in it.[8]

Cairns J., on the other hand, said that on the pleadings the misrepresentation point was not open to the appellant. He would find against the estate agent because the commission clause had "no clear meaning at all."[9] For the clause to have legal effect, "it must be ascertainable at the time of the contract of agency what class of events will attract commission."[10] In his view, if the sale went through, the agent would be entitled to commission "on the usual terms or possibly on the basis of a *quantum meruit*."[11] What are "the usual terms" in a profession with no universally regulated scales of charges?[12]

These judgments may father many.

H. W. WILKINSON.

TWO CASES ON CONTEMPT

IN *R.* v. *Thomson Newspapers Ltd., ex p. Att.-Gen.*[1] contempt proceedings were instituted against the editor, proprietors and printers of *The Sunday Times* newspaper following the publication of an article that referred to the background of one Malik at a time when he was awaiting trial on a charge under the Race Relations Act. The several defendants conceded that the description of M. as a person who had had "an unedifying career as brothel-keeper, procurer and property racketeer" was potentially prejudicial to his fair trial,[2] and liability was held to have been incurred even though the

[8] [1968] 1 W.L.R. at p. 688.
[9] *Ibid.* at p. 684.
[10] *Ibid.* at p. 685.
[11] *Ibid.*
[12] The scale fees of the Chartered Auctioneers' and Estate Agents' Institute, for example, do not bind non-members.

[1] [1968] 1 All E.R. 268.
[2] Malik was convicted and appealed to the Court of Appeal seeking to have the conviction set aside on the grounds, *inter alia*, that the publication had *in fact* deprived him of a fair trial. The appeal was dismissed. See [1968] 1 All E.R. 582. For a general discussion of the main categories of conduct likely to amount to a contempt through an infringing of the *sub judice* rule, see Miller, "Contempt of Court: The *Sub Judice* Rule" [1968] Crim.L.R. at p. 187 *et seq.* For further recent incidents, see *The Times*, February 21, 1968

Divisional Court was, in the words of Lord Parker C.J., " quite satisfied that this newspaper, with a clear record of some 150 years, had devised, and the editor, Mr. Harold Evans, had ensured was operated, an elaborate and reasonable system to avoid contempts of this sort, or indeed any contempt of court." [3] Times Newspapers Ltd. was nevertheless ordered to pay a fine of £5,000, though no separate fine was imposed upon the editor or the printers.

The decision in this case, though by no means surprising, cannot be regarded as entirely satisfactory. Apart from the fact that it is hard to justify the imposition of liability without fault in a common law offence, it is especially difficult to appreciate why Times Newspapers Ltd. should have been fined such a substantial sum when its officers had taken all reasonable precautions to prevent the error of judgment that gave rise to the publication of the prejudicial matter.[4] Surely, given the adequacy of the system that had been adopted and operated, it is not a sufficient justification to assert with Lord Parker that this is a " serious case " having regard to the likelihood of prejudice being occasioned.[5]

These points apart, it should further be noted that the contrasting of this decision with the provisions of section 11 (1) of the Administration of Justice Act 1960 highlights something of an anomaly within this area of the law. Section 11 (1), it may be remembered, reverses the decision of the Divisional Court in *Odhams Press Ltd.*[6] and provides that a publisher will not be held to have committed the offence if having taken all reasonable care [7] he does not know or have reason to suspect that proceedings are pending against D, the person whose trial is allegedly prejudiced. According to *Thomson Newspapers Ltd.*, however, the position is apparently different where an editor or other *primary* publisher reasonably fails to appreciate that a given publication contains matter that reflects adversely upon the character of E, a person against whom he knows proceedings to be pending.[8] This distinction does not appear to reflect anything other than the essentially piecemeal approach to the problem that was adopted in the 1960 Act. It is to be hoped that time will again be found to introduce the necessary amending legislation.

(remarks by Mr. James Callaghan in the House of Commons suggesting that " the man who committed the murder this morning at Acton has been arrested "); *ibid.*, March 27 and 28, 1968 (television programme containing an item on Charles Richardson at a time when his appeal was pending); *ibid.*, July 17, 1968; (comments in the C.A. on the legality of a television interview conducted by David Frost with Savundra at a time when criminal proceedings were apparently imminent).

[3] [1968] 1 All E.R. 268 at p. 270.

[4] The error was on the part of the writer of the article and the barrister employed to read the galley proofs.

[5] *Ibid.* at p. 270.

[6] [1956] 3 All E.R. 494. S. 11 was enacted following the recommendations of the Justice Committee in their report *Contempt of Court* (1959).

[7] s. 11 (3) places the onus of proof on the defendant publisher.

[8] Protection is, however, afforded by s. 11 (3) of the Act where a secondary publisher or distributor makes the same (reasonable) mistake.

The decision of the Court of Appeal in *Ex p. Blackburn (No. 2)* [9] dismissing an application for an order against Mr. Quintin Hogg for contempt through an alleged "scandalising" of the court is an altogether more satisfactory case. The proceedings here arose from an article in the magazine *Punch* in which Mr. Hogg criticised certain observations of the Court of Appeal and certain decisions which he erroneously attributed to that court but which were in fact decisions of the Queen's Bench Division. On the facts of the case the failure of the application was entirely predictable since the published remarks appear to have been well within the bounds of permissible criticism.[10] They clearly did not have the necessary tendency to interfere with the administration of justice—a tendency which would incidentally normally be considered to be present where there was an imputation of corruption, conscious or unconscious bias [11] or incompetence [12] to a court or to a member of the judiciary acting in his official capacity.[13] The case is nevertheless of considerable interest and importance in that the Court of Appeal went out of its way to emphasise the need to preserve the right to comment freely upon all matters of public interest, including the administration of justice. This is to be welcomed and (in conjunction with the recent remarks of Lord Gardiner when speaking in the House of Lords debate on the law and the Press) [14] it should help to allay the fears of those such as Mr. Cecil King who have consistently maintained that this obscure branch of the law of contempt so operates as to prevent "all serious criticism of judicial proceedings above the level of magistrates' courts." [15] Whether the case is in fact authority for the view that a technical defence of fair comment is available to a person charged with "scandalising the court" is not entirely clear. On balance the answer appears to be

[9] *R.* v. *Metropolitan Police Commr., ex p. Blackburn* [1968] 2 W.L.R. 1204; [1968] 2 All E.R. 319.

[10] Mr. Hogg stated, *inter alia*, that the Gaming Act had been "rendered virtually unworkable by the unrealistic, contradictory and, in the leading case, erroneous decisions of the courts, including the Court of Appeal."

[11] See, *e.g.*, *Wilkinson, The Times*, July 16, 1930 (general manager of the company publishing the *Daily Worker* sentenced to nine months' imprisonment following a reference to Swift J. as "a bewigged puppet who exercised a strong class bias"); *New Statesman (Editor), ex p. D.P.P.* (1928) 44 T.L.R. 301; *Colsey, The Times*, May 9, 1931; *Vidal, The Times*, October 14, 1922.

[12] *Gray* [1900] 2 Q.B. 36 ("No newspaper can exist except upon its merits, a condition from which the Bench, happily for Mr. Justice Darling, is exempt").

[13] The list does not purport to cover all categories of conduct or comment that may be viewed as having the proscribed tendency. In *Re Nicol* [1954] 3 D.L.R. 690, for example, the offence was held to have been committed where a newspaper article discussed a recently imposed death sentence and stated that capital punishment was itself murder and implicated in guilt "the 12 people who planned the murder" and the judge "who caused the exquisite torture of anticipation."

[14] H.L.Deb., Vol. 274, cols. 1488–1489.

[15] The statement was made at the A.G.M. of Sunday Pictorial Newspapers held on June 4, 1962. See also the Ninth Report of the General Council of the Press at p. 12 where Mr. King reiterates his view.

that it is authority for this proposition [16] notwithstanding a passage in the judgment of Salmon L.J. that appears to suggest that the defendant publisher must satisfy a criterion of "reasonable courtesy" as well as one of good faith.[17]

C. J. MILLER.

SEARCHES AGAINST NAMES IN THE LAND CHARGES REGISTRY

"THE real problem is, what is meant by the name or the names of the estate-owner in this legislation?" [The Land Charges Act 1925].[1] In *Oak Co-operative Building Society* v. *Blackburn* [2] the Court of Appeal made a justifiable policy decision on questionable legal grounds. Francis David Blackburn owned 84, Union Street, Southport. He contracted to sell the property to C and she took possession. Blackburn later made a mortgage which was registered in the Land Charges Registry against him. C consulted a solicitor who registered her contract as a C (iv) land charge against "Frank David Blackburn." Blackburn carried on business as an estate agent as Frank D. Blackburn and was usually addressed as Frank. He applied to the Oak Co-operative Building Society [3] for a fresh mortgage, they made a search against "Francis Davis Blackburn" and obtained the reply in standard form "No subsisting entries clearly affected [4] but the following entries which may or may not relate thereto appear." Then details of the registered mortgage against "Blackburn, Francis David, 26, Crescent Road, Southport, Lancs" were given. The mortgage was granted, the previous liability being repaid. Blackburn defaulted in his repayments and went bankrupt and the building society claimed (*inter alia*) possession from C. She claimed that her registration protected her. Ungoed-Thomas J. at first instance held that she was not protected by her entry against "Frank David Blackburn" because she had not registered "in the name of the estate-owner" within section 10 (1) of the Land Charges Act 1925. He said: "what is contemplated is that [a land charge] shall be registered in [the estate-owner's] proper formal names and not in any pet, familiar, nick or common forms of those names or any other names by which he may

[16] The decision of the Privy Council in *Ambard* v. *Att.-Gen. for Trinidad and Tobago* [1936] 1 All E.R. 704 is generally considered to be to the same effect. It has long been clear that the defence is available in Australia. See, *e.g.*, *Nicholls* (1911) 12 C.L.R. 280 at p. 286 especially; *Dunbabin*, *ex p. Williams* (1936) 53 C.L.R. 434; *Brett* [1950] V.L.R. 226. *Sed quaere* whether a defence of justification is available. In *Att.-Gen.* v. *Blomfield* [1914] N.Z.L.R. 545 at p. 568 Williams J. suggested that it was not.

[17] *Cf.* [1968] 2 W.L.R. 1204 at p. 1207.

[1] Russell L.J., delivering the judgment of the Court of Appeal in *Oak Co-operative Building Society Ltd.* v. *Blackburn* [1968] 2 W.L.R. 1058 at p. 1060; reversing the decision of Ungoed-Thomas J. [1967] Ch. 1169; [1967] 2 All E.R. 340.

[2] *Supra.*

[3] Russell L.J. called his application form "a pack of lies" (p. 1068).

[4] The report says this but the standard wording is "affecting," the *All England* report says "affecting" [1968] 2 All E.R. 117.

from place to place or time to time be known." [5] In his view, if registration against an informal name were effective, then one could not rely on a search against Richard without searching against Dick as well, or against Henry without searching against Harry and Hal. The Court of Appeal [6] unanimously reversed his decision and said that if a registration is made " in what may fairly be described as a version of the full names of the vendor, albeit not a version which is bound to be discovered on a search in the correct full names, we would not hold it a nullity against someone who does not search at all, or who (as here) searches in the wrong name." [7]

The appeal court pointed out that a purchaser who had made an official search against Francis David Blackburn would have obtained a clear certificate and C's entry would not have prevailed against him.[8] The dispute here was between one person who made an official search in an incorrect version of the estate-owner's name and another person who made an entry in an informal version of the estate-owner's name. Where both parties are in error, who loses? The court arrived at its conclusion by considering (*inter alia*) sections 10 (2), 17 (4) and 19 (1) of the Land Charges Act 1925.[9] The court's approach was to say that the land charges " system should be made to work in favour of those who seek to use it in a sensible and practical way " [10] and this meant in the case before it that C, having registered against a name under which Blackburn " ordinarily passed " (Frank),[11] had done enough to defeat a clear search against a name which Blackburn did not possess (Davis).

On appeal there were, in effect, held to be three categories of registration; the first a registration against a correct formal name, which will bind all searchers (or persons who do not search at all); the second a registration in a version of the full names, which will bind only inaccurate searchers (or persons who do not search at all); the third (by implication) a registration in what cannot be said to be a version of the full names, which will bind no one [12]—if property is owned by AB and a land charge in respect of the property is registered against CD, a purchaser is not bound by it even if he searches and finds it, for CD is not the estate-owner's name. This threefold categorisation may be " sensible and practical " but it seems at variance with section 198 (1) of the Law of Property Act 1925, which says that registration as a land charge " shall be deemed to constitute actual notice . . . to *all persons* and for *all purposes* connected with the land affected." Apparently this means that a

[5] [1967] Ch. 1169 at p. 1178.
[6] Harman, Russell and Sachs L.JJ.
[7] p. 1061.
[8] *Ibid*; s. 17 (8) of the Land Charges Act.
[9] s. 10 (2), " a land charge shall be registered in the name of the estate-owner." By s. 17 (4), every requisition for a search shall specify the name against which search is to be made. S. 19 (1) allows general rules to be made, for example, " as to forms and contents of applications for registration . . . requisitions for and certificates of official searches." These forms indicate that the estate-owner's name should be shown; Schedule, Land Charges Rules 1925 (S.I. 1925 No. 1093).
[10] p. 1061.
[11] p. 1060.
[12] p. 1061.

registration is either effective against everyone or against no one. There seems no room for the court's second category.

Another problem is that of deciding in each case whether or not the registration is in a version of the estate-owner's full names. Is Bessie a version of Elizabeth? Is Jack Kennedy a version of John Fitzgerald Kennedy? The court considered it important that Blackburn was known as Frank though correctly called Francis.[13] What if I register against "Bessie" when Elizabeth, the estate-owner, is rarely or never called anything but Elizabeth? Is the test "Was she known as Bessie?" (subjective) or is it "Is Bessie a sufficiently common corruption of Elizabeth to be an acceptable version of it?" (objective). This remains to be elucidated.

A regrettable result of the decision is that those who rely on personal searches are put at risk. A personal searcher against the defendant's true formal name of Francis David Blackburn would not have discovered the entry against Frank but would, in the Court of Appeal's view (*obiter*), have been bound by the entry, under section 198 (1). The court dismissed the problem by saying "we think that anyone who nowadays is foolish enough to search personally deserves what he gets."[14] But the system is provided by the Act and the court ought not to make it useless because unreliable through a cause the searcher cannot guard against. It is inconsistent that section 198 (1) should have been read one way when the court considered the point at issue in the case (*i.e.*, "all persons" in section 198 (1) does not mean "everyone" when the entry is against a version of the true formal name) and another way when an *obiter dictum* was being dropped (*i.e.*, "all persons" means "everyone," even a personal searcher against the true formal name). It is suggested that the same principle should apply to personal searches as the court applied to official ones, namely, that if they are made against the correct formal name, then no registration in a version (which must strictly be incorrect) of the name should prevail over the clear search. The burden of making a correct entry should fall on the person who is going to seek to rely upon it and who has the means of finding out from the estate-owner what is his correct name. It is suggested that the decision at first instance, which does not involve the abuse of section 198 or the hazarding of personal searchers, is sounder law and that it is regrettable that it was, as a matter of policy, unacceptable to the Court of Appeal.

H. W. Wilkinson.

Trustees Purchasing Reversions

"There is a long established rule of equity from *Keech* v. *Sandford* downwards that if a trustee who owns the leasehold gets in the freehold that freehold belongs to the trust and he cannot take the

[13] p. 1056. [14] p. 1061.

property for himself."[1] This recent dictum of the Master of the Rolls is hardly consistent with the expression of the rule relating to the purchase of a reversion by a trustee usually found in the text-books. A typical statement is that in *Lewin on Trusts*.

> "[The rule in *Keech* v. *Sandford* has been] extended by analogy to purchases of reversions on leasehold property when the leaseholds are renewable by custom or contract. Though it has been held not to apply to the purchase of reversions where there is no right or custom of renewal the principle of *Keech* v. *Sandford* may even so apply if the freehold was offered to the trustee in his capacity as tenant."[2]

At first sight the English cases support the narrow rule of the books rather than the wide rule enunciated by Lord Denning but it will be suggested that an interpretation which supports the wide rule is possible, desirable and justified. (It is impossible to know what the Court of Appeal thought of the case-law on the point at issue since, as the *Weekly Law Reports* make clear, no cases were cited to the court.)

The rule in *Keech* v. *Sandford* originated in the granting by colleges and ecclesiastical bodies of leases which customarily they renewed,[3] the expectation of a renewal by the tenant being known as "tenant right . . . which though an improper, is become a technical term."[4] When the possibility of extending the rule to the purchase of reversions was raised less than twenty years later in *Norris* v. *Le Neve*[5] Lord Hardwicke commented that "No case has been cited in point but only argued by way of analogy to cases of leases which . . . are very different." That was the view also of Sir William Grant M.R. in *Randall* v. *Russell*,[6] who held that W, a life-tenant who purchased the reversion from X to whom it had been assigned by St. John's College, acquired it beneficially, not on the trusts affecting the lease which W held of the college:

> "If [W] had purchased from the College, it might be said, that she thereby intercepted and cut off the chance of future renewals, and, consequently, made use of her situation to prejudice the interests of those who stood behind her; . . .

[1] *Protheroe* v. *Protheroe* [1968] 1 W.L.R. 519, 521; [1968] 1 All E.R. 1111, 1112.

[2] *Lewin on Trusts* (16th ed.), p. 147; Halsbury's *Laws of England* (3rd ed.), Vol. 38, p. 857; White and Tudor's *Leading Cases in Equity* (9th ed.), ii, p. 650; Snell's *Principles of Equity* (26th ed.), p. 257; Ashburner's *Principles of Equity* (2nd ed.), p. 310; Keeton, *Law of Trusts* (8th ed.), p. 170. The rule is stated in these narrow terms by Wilberforce J. (as he then was) in *Phipps* v. *Boardman* [1964] 2 All E.R. 187, 202. Most authorities include fraud in their statement of the rule; a striking example of the latter being furnished by *Halsey* v. *Grier* [1918] 1 I.R. 185.

[3] Ashburner, *op. cit.*, p. 309; *Norris* v. *Le Neve* (1748) 3 Atk. 26, 38, *per* Lord Hardwicke.

[4] *Pickering* v. *Vowles* (1788) 1 Bro.C.C. 197, 199, *per* Lord Thurlow.

[5] (1748) 3 Atk. 26, 38. The Lord Chancellor was refusing leave to bring in a bill of review; he was not deciding the law on the point here under discussion.

[6] (1817) 3 Mer. 190.

> But, here, the situation of the parties was altered by the act of the landlord, without any intervention of the tenant for life. The College had aliened the property to an individual. The benefit attending the tenant-right of renewal with a public body was gone. A lease at a rack rent was all that was to be expected from the private proprietor. [W's] purchase from the first vendee wrought no change whatever in the situation of those who had interests in the lease as a College lease." [7]

Longton v. *Wilsby* [8] similarly held that a tenant for life in remainder was entitled in the absence of a customary or contractual right of renewal to acquire the reversion beneficially when a term of years had been devised to successive tenants for life.

Randall v. *Russell* was applied by Warrington J. in *Bevan* v. *Webb* [9] to the purchase by a partner of a reversion on a lease alleged to be held by the partnership to which he belonged. The learned judge denied that there was any general prohibition on the purchase of a reversion by a trustee or other person in a fiduciary relationship. To reach that conclusion it was necessary to consider the decision of the Court of Appeal in *Phillips* v. *Phillips*.[10] Although the headnote to that case states: "The doctrine that a renewal of leaseholds by a tenant for life enures for the benefit of the remainderman applies equally to a purchase of the reversion" the Court of Appeal did no more than follow *Randall* v. *Russell*, deciding that a tenant for life who purchased the reversion when the landlord refused a renewal must hold it on the trusts of the lease—which was an ecclesiastical lease, renewable by custom.[11]

The traditional formulation of the rule recognises two other situations where the reversion will be held on trust. First, where the trust instrument contains a covenant to renew from time to time, a trustee who makes renewal impossible by himself purchasing the reversion holds that reversion on trust [12]; and secondly, where the purchase was possible only by virtue of the purchaser being interested in the leasehold, *e.g.*, because the landlord was giving all his leaseholders an opportunity to enfranchise their holdings.[13] It

[7] *Ibid.* at p. 197. The earlier decision of the learned Master of the Rolls, *Hardman* v. *Johnson* (1815) 3 Mer. 347, to the same effect was dismissed by Warrington J. in *Bevan* v. *Webb* [1905] 1 Ch. 620, 627 as having "not much value as an authority" because no reason was given for the conclusion reached.

[8] (1897) 76 L.T. 770 (Stirling J.).

[9] [1905] 1 Ch. 620.

[10] (1885) 29 Ch.D. 673.

[11] Similarly *Leigh* v. *Burnett* (1885) 29 Ch.D. 231. Pearson J. made no distinction between renewing a lease and purchasing the reversion but the lease was customarily renewable—apart from any question of a special rule applicable to the relationship between mortgagor and mortgagee which was at issue in this case.

[12] *Trumper* v. *Trumper* (1872) L.R. 14 Eq. 295, *per* Bacon V.-C. at p. 309. Similarly *Re Lord Ranelagh's Will* (1884) 26 Ch.D. 590, where the lease was, anyway, renewable by custom.

[13] *Aberdeen Town Council* v. *Aberdeen University* (1877) 2 App.Cas. 544, 553, *per* Lord Hatherley; *Griffith* v. *Owen* [1907] 1 Ch. 194, *per* Parker J. at p. 205. An example of facts such as those envisaged by Parker J. is to be found in *Barrett* v. *Hanbury* [1919] 1 I.R. 275.

has been suggested [14] that *Protheroe* v. *Protheroe* is an example of this extension of the rule although the facts and judgments as reported make it impossible to tell.

A different view of the law was, however, taken by Chatterton V.-C. in the Irish case *Gabbett* v. *Lawder*.[15] An administrator had purchased at an auction the reversion on a customarily renewable lease; the court allowed a claim by those entitled to the personal property of the deceased that the reversion was held on trust for them. The Vice-Chancellor said that a trustee purchasing a reversion is caught by the general rule which prohibits a trustee profiting from his trust just as when he renews a lease; the special rule relating to the purchase of reversions, he explained, applies only to tenants for life who are not trustees for remaindermen under a settlement.[16] Certainly *Hardman* v. *Johnson*, *Randall* v. *Russell* and *Longton* v. *Wilsby* did all involve purchases by a tenant for life. *Bevan* v. *Webb* at first sight is inconsistent with *Gabbett* v. *Lawder* since Warrington J. treated tenants for life and persons in a fiduciary relationship as subject to the same rule but his remarks were strictly *obiter dicta* because he found as a fact that the firm did not have a lease of the premises where the business was conducted.

Such a view of the law, according with the dictum of Lord Denning, is more consistent with the general attitude of equity towards trustees than the rule, as it is normally set out in the books, drawing distinctions, "for which no satisfactory justification can be put forward." [17] The basis of the decision in *Keech* v. *Sandford* was the danger to the beneficiary; that decision is not confined to leases renewable by custom or as of right. Should not the rule relating to the purchase of the reversion be equally wide? [18]

PAUL JACKSON.

[14] Crane (1968) 32 Conv.(N.S.) 221. The exercise of a statutory right to purchase the freehold, *e.g.*, under the Leasehold Reform Act 1967, would no doubt prevent the trustee acquiring the reversion beneficially; *vide* Ashburner, *loc. cit.*

[15] (1888) 11 L.R.Ir. 295, 304, 308. See also *M'Kenna* v. *M'Kenna* (1901) 85 L.T.R. 229.

[16] *Contra Hart* (1905) 21 L.Q.R. 258, 261, who, relying on *Phillips* v. *Phillips*, argued that "Apart from the cases in which the relation between the parties is that of trustee and *cestui que trust* . . . it is plain that there is a fiduciary relation between tenant for life and remainderman." He put them in the same category as executor and beneficiary and mortgagor-mortgagee. (For the discussion of the "mystery of the fiduciary relationship" see Waters, *The Constructive Trust*, Chap. 2.) A tenant for life under the Settled Land Act 1925 is now a trustee of the estate (s. 16 (1)) and therefore presumably in the same position as others in a fiduciary relationship.

[17] Pettit, *Equity and the Law of Trusts*, p. 269.

[18] Hart, *op. cit.*, p. 264.

REVIEWS

CIVILIANS UNDER MILITARY JUSTICE: The British Practice since 1689 especially in North America. By FREDERICK BERNAYS WIENER. [Chicago and London: The University of Chicago Press. 1967. xxx and 346 pp. (including index). 104s. net.]

FASCINATING to read and a joy to handle, this is a most thoroughly researched work of legal history and beautifully produced by the University of Chicago Press. Mr. Wiener was counsel in a series of cases before the United States Supreme Court that established the invalidity under the Constitution of military trials of civilians in peacetime. The preparation of these cases inspired him to pursue further his historical research and this book is the result. Mr. Wiener has studied an enormous range of sources and, in particular, the headquarters order books of the British Army in North America and the records of trial recorded in the War Office court-martial books, in order to examine the extent of military jurisdiction exercised by the British Army over civilians in the Seven Years War and the American War of Independence.

Mr. Wiener has examined the exercise of military jurisdiction over two broad groups of civilians—camp followers, *i.e.*, employees and dependants of the Army in the field, and the inhabitants of occupied territory. Many of the civilians supporting the Services, like sappers and drivers, were brought into the Army by Wellington's day, but as Sir Charles Oman has graphically described in *Wellington's Army*, hosts of women, "expert plunderers . . . and much given to fighting" accompanied and impeded the British Army then as they had done on the American Continent in the previous century and as they were to go on doing till the end of the Crimean War. The trial in wartime of women civilians and other followers by military courts abroad rested on a prerogative Article of War, first made in 1747. Attempts to subject civilians in peacetime to military jurisdiction, *e.g.*, in Gibraltar and Minorca, failed because the Judge Advocate General's Office ruled consistently against such jurisdiction. Mr. Wiener gives much credit for this to Sir Charles Gould, the first lawyer Judge Advocate General of the British Army and commemorates him by reproducing as a frontispiece to this book the splendid Gainsborough portrait that hangs in the offices of the Equitable Life Assurance Society in London. The author points out that Sir Charles Gould's rulings anticipated what the U.S. Supreme Court was to rule two centuries later in the cases already referred to.

The other group of civilians over whom the military exercised jurisdiction in the Seven Years War and the American War of Independence consisted of inhabitants of occupied territories. Yet it was only in Wellington's day that the legal justification based on the law of belligerent occupation was articulated. The interesting aspect of this part of the story is that although Sir Charles Gould in 1768 (when Deputy J.A.G.) had strongly asserted that there was no such jurisdiction, 156 inhabitants were tried by court-martial in New York during its occupation by British Forces between 1776 and 1783 and, with but feeble protest, Sir Charles (who had now become Judge Advocate General) seems to have acquiesced. Mr. Wiener refers to Sir Charles's "mildness" in this matter ("pusillanimity" might have been a better word) but is unable to explain it. It does surely point to an inherent weakness in the J.A.G.'s position that makes less surprising the failure of historians to remember Sir Charles of which Mr. Wiener complains.

For anyone who wishes to engage on the history of English military law which, as Mr. Wiener emphasises, has yet to be written, the excellent text of

this book is matched by excellent footnotes and appendices. For every piece of information that Mr. Wiener has quarried from his sources, he has laid bare yet more sources for the researchers of the future, both lawyers and historians. One small regret—many descriptions of punishments awarded by courts-martial are given but none of how the trials were conducted. The way in which court-martial procedure has developed over the years would be a most interesting field of study.

GORDON BORRIE.

LEGAL FICTIONS. By LON L. FULLER. [Stanford University Press. 1967. xiii and 142 pp. 36s. net.]

EXISTENTIALISM AND LEGAL SCIENCE. By GEORGE COHN. [New York: Oceana Publications Inc. 1967. 148 pp. $6.]

THE first of these two books constitutes the first publication in book form of three articles which were published in the *Illinois Law Review* in 1930 and 1931. They were well worth republishing both for their intrinsic merit as well as for the distinguished reputation of their author, who has now for many years been a Professor of Law at the Harvard Law School. Views on the role of fictions in the law have tended to oscillate between the two extremes of Bentham, who once wrote of "the pestilential breath of Fiction," and of Blackstone, who referred to fictions as "highly beneficial and useful." Little attempt has, however, been made to analyse the precise character of legal fictions and their role in the legal process. The first two chapters of this book subject the whole question of legal fictions to a searching analysis, both from the point of view of their character, and also from the point of view of their motivations. There is little doubt that any lawyer will derive considerable clarification from the careful analysis in this portion of the book.

On the other hand, the author is well aware that there is a deeper underlying philosophical problem as to the nature of fictions generally, and their bearing on conceptual thought in general, and legal concepts in particular. In his final chapter Professor Fuller attempts to probe these deeper aspects of the subject mainly in the light of the somewhat outmoded, but by no means totally discredited philosophy of Hans Vaihinger, as expounded in his celebrated book, *The Philosophy of "As If."* This book was first published in 1911 and made some philosophical impact at the time by its novel approach to the theory of truth. Vaihinger apparently thought that there were many analogies between the character of certain fundamental fictitious assumptions in physical science and certain types of legal fiction. Professor Fuller, while recognising that Vaihinger did little to clarify the nature of legal fictions as such, regards this as a valuable insight. He agrees that there are serious criticisms that can be made of Vaihinger's general position, but he still argues that the lawyer can increase his understanding of the legal techniques and the character of "conceptualism," by invoking some of Vaihinger's doctrines. To a modern reader, however, it must be confessed that though the doctrines of Vaihinger are certainly not devoid of interest at the present day, the present-day seeker after philosophic truth underlying the law and its analysis is unlikely to direct his attention very actively, if at all, in this particular quarter.

The second of these books bears a somewhat misleading title, since it has nothing whatsoever to do with Existentialism as understood in contemporary philosophy. In effect, what this book amounts to is a strong plea in favour of getting rid of "conceptualism" in jurisprudence. This book, which is translated from the German, proceeds from the premiss that there is something startlingly novel in its approach to legal concepts. This may conceivably be so for those to whom the book was originally addressed, but it seems most improbable that any common lawyers in this country or the United States will find anything either particularly startling or illuminating within its covers.

LLOYD OF HAMPSTEAD.

LAW. By LORD LLOYD of HAMPSTEAD. [London: Heinemann Educational Books, Concept Book Series. 1968. 122 pp. (with index). 7s. 6d.]

LAW books for established lawyers and students abound, while the potential sources of fresh legal blood are largely ignored. The sixth former, pondering whether or not to read law at university, desperately needs a book which will give him a preview of the general nature of law and the functioning of a legal system in modern society. Lord Lloyd's little paperback admirably satisfies that need. This is not an introduction to English law or to the English legal system, and technical details of particular branches are therefore avoided. The result is an attempt to introduce the reader to the kind of conceptual thinking required by a study of the law.

In his characteristically clear and attractive style, the author examines in five chapters law and society, the essentials of a legal system, and the main divisions of the law—civil and common law, criminal law, the law of procedure, public and private law (including an analysis of the law of the family, property, contract and tort). A note on legal education and suggestions for further reading are appended.

The book can be wholeheartedly recommended to the sixth former. It will give him a perspective of the law and its main compartments which he would almost certainly lack without the benefit of Lord Lloyd's treatment, and it leads him logically and painlessly through most of the important general concepts, illustrating them with practical examples. But at the same time difficult and controversial subjects are not avoided, so discussion may be found of, for example, the relationship between law and morals, why law is obeyed, the purposes of punishment and race relations legislation. Indeed, the freshman could profitably make the reading of this book his first task (if he has not already done so), and faculties might consider including it on their preliminary reading lists.

The author is remarkably comprehensive yet concise, but perhaps one point may be considered for any new edition. The sixth former will be thinking about his career as a whole at the time he reads this book, and so perhaps the characteristics of, and the opportunities offered by, the two branches of the profession could be explained a little more fully. In any event, *Law* should be essential reading for the prospective or new law student.

RODNEY BRAZIER.

GATLEY ON LIBEL AND SLANDER. Sixth Edition. By R. L. MCEWEN and P. S. C. LEWIS. [London: Sweet and Maxwell. 1967. cxxiii and 768 pp. (including index). £8 17s. 6d.]

THIS book has been sufficiently long established as the Bible of the practitioner in the sphere of defamation not to call for a detailed review at the present stage of its career. The book has always included two valuable features among others, namely, the emphasis upon procedure and practice as well as on substantive law, and secondly the citation of a great many Commonwealth and American reported cases. The first of these features, involving the division of the book into two separate parts, dealing respectively with substantive and procedural law, has entailed some element of repetition and confusion, and the editors have made a praiseworthy attempt in the present edition to reduce this by some rearrangement and simplification.

Recently the law of defamation has been subjected to a good deal of critical comment, both from the judiciary and from the Press. The main lines of judicial criticism have been on the length and complexity of trials for libel, and the difficulty of making juries appreciate the issues in the cases before them, as the law requires them to be directed upon the intricacies of such

defences as fair comment, qualified privilege and malice. The judiciary has also shown a strong tendency since *Rookes* v. *Barnard* [1964] A.C. 1129, to curb quite drastically the awards of substantial damages made by juries in favour of plaintiffs in libel actions. All the same, the features of a defamation action which tend to produce prolonged and complex trials seem to derive not so much from the technicalities of the substantive law, as from the type of witness trial which is characteristic of our common law system. Needless to say, these difficulties tend to be accentuated where trial is before a jury, which still remains the common practice in English defamation actions at the present day, notwithstanding the fact that the jury has become obsolete in most other types of civil trials.

On the whole, the categories of defence available to a defendant in a libel action are reasonably geared to producing a just balance between the public interest in freedom of speech, and the right of the individual to be armed with sufficient weapons to defend himself against assaults on his reputation which may be launched by large, powerful and wealthy organisations. This is not to say that the law in certain details may not stand in some need of amendment, and one may express the hope that eventually this subject will engage the careful attention of the Law Commission. But it remains difficult to see how the character and length of trials in defamation actions can be seriously altered or curtailed so long as the type of hearing continues which depends on the giving of oral evidence with full and elaborate cross-examination of witnesses. There may well be a case for the review of our general procedural approach in civil actions, though there seems no particular case for concentrating on libel actions rather than civil claims in general. However, attempts to modify or change our procedure in any radical way, rightly or wrongly still encounters strong resistance from the legal profession, as is sufficiently instanced by the Evershed Report a few years ago, and the recent Winn Report on Personal Injuries Litigation. As for the retention of the jury, there still remains a fairly strong sentiment that the issues in defamation do raise questions which are eminently suitable for that form of trial, though if the Court of Appeal is going to continue its policy of drastically reducing the awards of juries in libel actions and ordering new trials, it may well be that the usefulness of the jury will be greatly reduced.

As to the attacks of the Press on the present state of the law, these mainly concentrate on the expressed desire for a new defence in defamation whereby a defendant, and in particular a newspaper, should be able to defend a libel action on the ground not of the truth of the allegations made, but of a reasonable belief in their truth. This proposal was put forward in a Report of a Joint Working Party of members of JUSTICE and the Press, under the chairmanship of Lord Shawcross, but it was strongly opposed by many well-informed speakers in the debate which took place in the House of Lords on May 26, 1966. It is argued that without such a right the Press is seriously hamstrung in its attempts to inform the public as to many matters of a scandalous character, or which are capable of being to the public detriment. As against this, it is cogently argued that to confer upon the Press a power of this kind could develop into a major engine of oppression. For public or private individuals to have to embark on the immense financial risks of a libel action, with the prospect of being met by a defence to the effect that, though what was said about the plaintiff was false, nevertheless it was supported by a mass of rumours and speculations, so that the outcome of the action, even if successful, might result in the plaintiff's reputation being diminished rather than vindicated, would indeed be a daunting prospect.[1]

For the present, at any rate, the legal practitioner and his clients are obliged to navigate as best they can among the innumerable shoals which

[1] For a fuller discussion of this and other recommendations contained in the Report of the Working Party, see the reviewer's article "The Law and the Press" in [1966] *Current Legal Problems* 43.

beset their course in this highly technical and complex branch of the law. There is little doubt that so long as the law remains in its present form—and it seems unlikely to undergo any radical transformation in the visible future—this book will prove to be an invaluable guide to all those venturing upon these troubled waters.

LLOYD OF HAMPSTEAD.

THE FORENSIC LOTTERY. By TERENCE G. ISON. [London: Staples Press. 1967. 108 and (appendices) 109 pp. 68s. net.]

MR. ISON has a large theme. He shows the inadequacies of the tort system as a redress for personal injuries. He would virtually put tort teachers out of work by abolishing the law of torts in personal injury actions and putting in its place a national insurance plan of sickness and injury compensation. The book is original and the reforms are carefully thought out. He has made the best effort yet to obtain data on the damages recovered and the costs involved in tort actions. He circularised many solicitors for details about their recent tort claims and obtained heartenigly numerous replies. The author does not examine meticulously the possible solutions to his problem. He is content to propound his one solution, for the most part unsupported by argument—in parts it reads more like the Summary of Recommendations of a Law Reform Commission than the Report itself. The key point in any such scheme must be its cost and his discussion of this is quite inadequate if he is to "sell" his proposals.

Mr. Ison has done himself no service by his title for the book. It also reads like a 1964 thesis; so many subsequent changes have been ignored. The thoughts of the Winn Committee so far published would have been highly relevant to much of his earlier treatment of the present system. He may be paying the price for entrusting his work to a publisher who is not a specialist legal one: the very first case cited is misspelt, and the page references are often unreliable. His information about current insurance practice is sketchy; for example, the Norwich Union writes policies of the kind the absence of which he deplores—those guaranteeing periodical payments by way of loss of earnings for the period of accident disability (the main gap in the security arrangements of most law teachers, incidentally). He misses the connection between the operation of knock-for-knock agreements and premium-loading.

This is a book worth reading for its submission of a novel set of proposals and for the new data on damages and costs in personal injury actions under the present system.

HARRY STREET.

TAKE-OVERS AND AMALGAMATIONS. Second Edition. By M. A. WEINBERG [London: Sweet & Maxwell. 1967. xxvi and 800 and Appendices and Index 71 pp. £5 5s. net.]

THE second edition of Mr. Weinberg's book deserves to receive as warm a welcome as the first. In this edition the material in Parts Three and Four has been redistributed and considerably expanded. Part Three is now devoted to a "point by point" analysis of the "Detailed Procedure for Take-over Bids." This consists of a step by step account of the legal and financial tactics employed in various types of bid. It examines the Board of Trade and Stock Exchange disclosure rules, as well as those required by the Companies Act. This part concludes with a brief account of the way the powers given by the Monopolies and Mergers Act 1965 are used. Part Four has two new chapters on taxation which take account of the new system of corporation and capital gains taxes.

In response to some criticism made of the first edition about undue repetition, Mr. Weinberg has tried to reduce this by increasing the number of cross-references. He quite rightly retains a very lucid order of exposition based on the actual methods of take-over and amalgamation in use today. These, of course, do not mesh in with the various legal procedures provided by the Companies Act 1948, each of which may be employed in different types of bid. In consequence, the same legal principles and procedures must be referred to in several different contexts, but this unavoidable overlapping is minimised by the sensible use of cross-references.

Although Mr. Weinberg makes an indirect reference to the American cases like *Perlman* v. *Feldmann*, a fuller discussion of these decisions and, indeed, of the whole question of the sale of controlling shares would have been very valuable. At present English law is unduly permissive in its attitude towards the take-over of small or medium companies by the simple expedient of transferring a controlling block of shares. While the author accepts that *Percival* v. *Wright* blocks the natural remedy of an action by the aggrieved minority shareholders, even in the case where they sold their shares to the majority in ignorance of the bid, he suggests that the company itself may have a remedy. It is difficult to see what possible injury to the company (as opposed to the minority) can result from the sale of controlling shares at whatever profit to the sellers. Nothing in the two House of Lords decisions which Mr. Weinberg cites would seem to support this remedy he proposes. Furthermore, as he readily admits, such a remedy would have the unfair result of giving the take-over bidder a refund on the price he agreed to pay, while it ignores those who have a genuine ground for complaint. What is wanted is a new statutory remedy to protect minority shareholders in those cases where the value of their holding suffers as a consequence of the change of control. The Jenkins Committee unfortunately failed to deal with this problem, though it proposed a remedy against directors who buy or sell their company's securities while failing to disclose material information.

This book is far more than a practical manual of legal, financial and fiscal tactics. It has many valuable suggestions for reforming the legal machinery governing take-over bids. This constructively critical approach culminates in a proposal at the end of the book for a "Uniform Procedure for Amalgamation." While avoiding the unnecessary complexity and overlapping of the existing legal procedures, this uniform procedure would be sufficiently adaptable to meet the legitimate requirements for the various forms of take-over bid. Mr. Weinberg's work cannot be too highly praised both for its scholarly qualities and for the service he has performed for the practitioners in an area which had previously received no adequate attention.

A. J. BOYLE.

FUNDAMENTAL RIGHTS IN THE IRISH LAW AND CONSTITUTION. Second edition. By J. M. KELLY. [Dublin: Allen Figgis & Co. Ltd. 1967. xxxiii and 855 pp. 80s. net.]

THIS reviewer had the pleasure of welcoming the first edition of Professor Kelly's book at some length (25 M.L.R. 506), and accordingly it is not necessary to provide more than a brief notice on this occasion. The book has established itself as a standard work on the Irish Constitution just at a time when judicial decisions in the Republic upon various aspects of civil liberties have been increasing markedly in number. The author has taken the opportunity to bring his text up to date and to incorporate appropriate discussions of the new cases. At the same time he has rearranged some of the material. Short new chapters appear upon the right to "bodily integrity" (deduced from the decision of Kenny J. in *Ryan* v. *Att.-Gen.* [1965] I.R. 294) and upon political rights; and the final chapter, on the administration of justice

and the rule of law, of which this writer was critical six years ago, is now less indigestible, though its increase in length from seventy to nearly 100 pages makes it something of a monster. It can be suggested that this chapter is still not satisfactory, for it still seems mistaken to try to include chunks of administrative law in this book. The inadequate accounts of tribunals have been dropped, but the author still tries to cover the general field of judicial control of administrative authorities, and no administrative lawyer can consider two pages on natural justice as very fruitful. There thus remains an imbalance in the book, which is a great pity, for the parts of the work more properly dealing with constitutional law are very good indeed. A Table of Statutes is now included, and the previous rather haphazard Bibliography is omitted. The book is about a third longer than the first edition, and printed on better paper (though there is no significant change in the binding or cover), but the increase in price from 85s. in 1961 to 80s. in 1967 is to be deplored.

D. C. M. Yardley.

Civil Rights, the Constitution, and the Courts. By Archibald Cox, Mark De Wolfe Howe and J. R. Wiggins. [Harvard University Press; London: Oxford University Press. 1967. 76 pp. 24s. net.]

This little book consists of three papers presented to the Massachusetts Historical Society and possibly that which will create most interest on this side of the Atlantic is the contribution entitled "The Press and the Courts" from Mr. Wiggins, editor of *The Washington Post*. He starts with the assertion that the papers do not publish enough crime news and do not follow closely enough the conduct of the police. Only a very small proportion of cases are reported: as crime increases, Press resources appear to remain much the same. He favours public scrutiny of the activities of courts and is aware of the dangers of "trial by newspaper"—but he considers that the number of accused whose fair trial is prejudiced by police disregard of defined rights exceeds by a ratio of tens of thousands to one the number adversely affected by pre-trial publicity. He is unhappy at the persistent failure of penal institutions and he seeks a constructive system of supervision in place of "a system of retributive justice that neither corrects the criminal nor protects the public."

Mr. Cox discusses problems arising from the civil disobedience campaign over segregation and Professor Howe handles a rather similar subject in his essay "Federalism and Civil Rights." Both write with an impressive knowledge of the historical background.

Florence O'Donoghue.

The Constitution of Malaysia. By L. A. Sheridan and Harry E. Groves. [New York: Oceana Publications Inc. 1967. xxxiv and 398 pp. No price stated.]

The Constitution of India. By M. C. J. Kagzi. Second edition. [Delhi: Metropolitan Book Co. Private Ltd. 1967. v and 698 pp. Rs. 80.]

Constitutions of Modern States: Selected Texts. By Leslie Wolf-Phillips. [London: Pall Mall Press. 1968. xxvi and 274 pp. 55s. net.]

The Constitution of Malaysia is in effect a new edition of Professor Sheridan's book *The Federation of Malaya Constitution*, and it is an accurate, comprehensive and stimulating volume. The method of treatment is to present the

text of the Constitution in its own words, but annotated with extensive commentaries. It is, however, a pity that, as with all too many books published in America, the reader must keep turning to the end of the book to read the notes relevant to each page of text. For the most part the law is stated as at August 31, 1966, but some later developments are included, such as the Constitution (Amendment) Act 1966 (No. 59) and the case of *Ningkan* v. *Abang Haji Openg*, though in fact precious little case-law of any kind finds its way into the book. It is unnecessary here to attempt a résumé of the Malaysian Constitution, but a few things may perhaps be briefly noted. The Constitution of Malaya from the time of its independence is probably well enough known by readers of this *Review*, and it will be recalled that it had a strongly central basis, though the residue of power remained with the states. It is interesting to find that Sabah and Sarawak, which joined the federation in 1963, have much wider powers than the other states, and the authors suggest that the Constitution may indeed be rather like a loose federation of Malaya, properly so called, Sabah and Sarawak. Attention might also be paid to the qualified version of tabulated fundamental rights which is in the Constitution, and to the fact that, in addition to federal citizenship, there is also separate citizenship of nine of the states (not Malacca, Penang, Sabah or Sarawak), though it appears to have little practical importance. For comparative constitutional lawyers it may be that the most fascinating aspect of the Constitution is still the elective monarchical status, and there is probably no clear parallel to be found anywhere else of the Conference of Rulers, with its special functions as regards certain Bills, its powers to make religious decisions and some appointments, and even to remove the Yang di-Pertuan Agong (the Head of the federation), and its function of deliberating upon any matter it chooses.

Mr. Kagzi is a prolific writer, particularly upon constitutional and administrative law, and upon tax law. The first edition of *The Constitution of India* appeared in 1958, and so a second edition was certainly due. In recent years some states have been reorganised, and the Constitution has been affected by the proclamation of emergency in 1962. It is hard to keep up with the state of case-law upon civil liberties which this emergency has sparked off, but Mr. Kagzi has tackled them and all other aspects of the Constitution admirably. He has even managed to incorporate five pages on the case of *Golak Nath* v. *State of Punjab*, which had not been reported at the time he wrote, and which was decided by a specially constituted Bench of eleven judges in the Supreme Court. The decision dealt with many matters, and was eventually given by a majority of six to five, but, *inter alia*, it lays down that constitutional amendments which abridge and take away fundamental rights are to that extent void, a conclusion which illustrates once again the sound and careful work done in this field by the Indian courts. Altogether the author gives a good account of the Constitution, and his book is well laced with useful comment. On the last occasion that this reviewer commented upon a book by Mr. Kagzi he thought it necessary to draw attention to the extremely careless presentation by the publishers (26 M.L.R. 227), and it would have been pleasant to have been able to say that things had now improved. But they have not. It is a pity that Mr. Kagzi's English style does not match his scholarship, but few readers will wish to criticise on this account. But the book is littered with misprints of all kinds, and it is hard to believe that proof-reading was even attempted. It is sad that these things must be said, because the intrinsic worth of the substance written is high. The print is small, and so the book is indeed substantial, and it can be compared, for example, with the works of Hood Phillips or of Wade and Phillips in England. Let us hope that these publishers (for they are the same firm who published the work previously mentioned) will one day direct attention to the presentation of their finished products, but one matter of praise which can be noted is that the footnotes do at least appear on the pages to which they refer.

Constitutions of Modern States is the only new book in this batch. Mr. Wolf-Phillips, a lecturer in political science at the London School of Economics, has selected twelve constitutions as representative of the main types of constitutional theory and practice in modern organised societies. His criteria for their selection are utility, intrinsic interest, realism and the prominence of the countries covered in world affairs. The full texts of the Constitutions of China, France, West Germany, Indonesia, Japan, Malawi (chosen as being representative of African countries which have not swiftly abandoned their constitutions), the U.S.S.R. and U.S.A. are included. Abbreviated texts are given of the Constitutions of India, Mexico and Yugoslavia. The twelfth country is the United Kingdom, and one is reminded of that favourite examination question asked by examiners in constitutional law, asking the candidates either to attempt to draft a written constitution (or some part of it) for the United Kingdom, or else, more often, to discuss the matters which should be included in such a constitution. Mr. Wolf-Phillips rejects the traditional view that the United Kingdom Constitution is unwritten, for he shows well enough that there are masses of documents which are constitutional in character. Yet it is curious that even he is unable in the space of this book to put them together coherently enough to provide that long-sought-after written constitution for the country. The United Kingdom section of this book is about twenty pages, which is the average length taken up by each of the other countries dealt with. Starting with basic rights and liberties and the expected slices of Magna Carta, the Bill of Rights and the Act of Settlement, the author moves on to the formation of the United Kingdom, and again manages to produce coherent passages from various statutes. But thereafter he is forced to abandon his effort to write the Constitution, and the later sections are mostly composed of little more than a string of references to a mass of statute-law, statutory instruments, etc., with only the most general of statements as to what they are all about. For example, under the title "The Sovereign," we find a sub-title "Royal Succession," with eight entries under it. The first entry is simply "Statutory limitations on the succession to the Crown," followed by references to parts of six statutes. The fifth entry is "Coronation oath and declaration," followed by references to another six statutes. Under some of the later sections, on, for example, the judiciary and the armed forces, the collection becomes a long list of source materials, with only the very barest headings to group them together. It is not intended here to belittle the author's efforts, but merely to suggest that perhaps in the end his collection is far more like the ideal answer to the second of the possible examination questions mentioned above than to the first. This is a splendid collection of references from which the constitutional materials of the United Kingdom can be derived, but it is very different from the texts of some of the other countries' constitutions included in this book. Furthermore, there is one gap in the treatment of the United Kingdom. In this reviewer's opinion the term "unwritten" *can* be justified in respect of our Constitution, because case-law and conventions play such a large part in the theory and practice of the Constitution. Mr. Wolf-Phillips does not underestimate their importance, as is made clear by his introductory remarks, but he states that "if the judicial decisions, the constitutional conventions or the authoritative opinions dealt with matters that came into dispute and were the subject of serious controversy, then, sooner or later, statute-law would replace them" (p. xi). On this basis, he submits that statutes form the kernel of the Constitution, and he states that it is absurd to use the term "unwritten" in respect of British constitutional arrangements. With the greatest respect, it can be suggested that Mr. Wolf-Phillips is really basing his view of what the Constitution is now upon a surmise as to what it might be if there were to be a show-down between the courts and Parliament. Is not the greatest defect of his view the fact that the whole position of parliamentary supremacy in the legislative field rests upon the courts' decisions that such supremacy should exist?

Theoretically it would be possible even to demolish this parliamentary supremacy in view of the House of Lords declaration in July 1966 that it can in future depart from its previous decisions where it considers it right to do so. There is little point in pursuing such a possibility here, but with respect the reviewer would have preferred to see the collection for the United Kingdom including references to some of our great constitutional cases, and even to conventions. But perhaps it might have been difficult to include exact references to some of the latter, and this only goes to prove that the British Constitution is indeed unwritten.

Mr. Wolf-Phillips' Introduction is written, naturally enough, from the point of view of a political scientist. Thereafter the prefaces to each national section are very short, a mere page or two in each case. But the enormous value of the book is that it contains a wealth of constitutional source material, which can be used for comparative purposes. All constitutionalists should be grateful to the author for his labours, and there is no doubt that the book is going to be a considerable teaching aid. None of the criticisms voiced in the last paragraph should be taken as meaning to detract from the very considerable value of this book, for they are only representative of the kind of difference of opinion which all British constitutionalists indulge in. But it is sad to find an English publisher following the regrettable practice of putting all the notes at the end of the book.

D. C. M. YARDLEY.

THE JUDICIAL COMMITTEE AND THE BRITISH NORTH AMERICA ACT. By G. P. BROWNE. [Toronto: University of Toronto Press. 1967. xviii and 246 pp. No price stated.]

HISTORY repeatedly shows how the pendulum of opinion swings. In politics the party which was so popular one year is often reviled by the majority a couple of years later, and that which was in sore straits in the earlier year may now bask in general approval. The poet or musician who died unrecognised is saluted as great after his demise. Even opinion about judges can vacillate, and in this book it is interesting to find a North American who clearly thinks that the work of the Judicial Committee of the Privy Council in Canadian cases was on the whole well done. There have been other indications in the past year or two that the Canadian hostility to the work of the Board in its last few years before the ending of Canadian appeals to the Privy Council has been tempered (see C. G. Pierson's *Canada and the Privy Council* (1960)), but this is the first major work to attempt an objective study of the jurisprudential basis of all 174 Canadian constitutional appeals (contained in 178 judgments), and to show a marked appreciation of the value of the decisions. The author supports the attention which the English courts and the Privy Council have traditionally paid to the maintenance of certainty and stability in the law, and he believes the tendency of the Board to follow its own previous decisions assisted this useful trend in Canada.

Professor Browne, an historian now at Carleton University, first wrote this work as an Oxford D.Phil. thesis, and it possibly suffers a little from this original form. As a monograph it must be regarded as of narrow scope, and it is not surprising to find that it should be of more intrinsic value to an historian than to a lawyer, though the examination of the Judicial Committee's interpretation of sections 91 and 92 of the British North America Act 1867 is well worthy of a constitutional lawyer's study. But unfortunately the book is so full of jargon, and the text so liberally strewn with such words as "exclusivity" and "evaluative," that many will find the argument difficult to follow. The text is only 170 pages, but the volume is filled out with bulky Appendices of Acts and a good Bibliography. The Index, on the other hand, is rather thin.

D. C. M. YARDLEY.

DIPLOMATIC PRIVILEGES AND IMMUNITIES. By CLIFTON E. WILSON. [Tucson, Arizona: The University of Arizona Press. 1967. 800 pp. inc. index. $8.50.]

THE author of this work is Associate Professor of Government and Research Specialist in the Institute of Government Research at the University of Arizona. His main purpose has been to examine diplomatic privileges and immunities in their modern setting, particularly against the background of the Cold War and the many and varied changes that have occurred upon the international scene since the end of the Second World War.

This book is best appreciated if it is realised that it does not set out to be a comprehensive text on the law of diplomatic privileges and immunities. While it covers the legal aspect adequately, it is written from the point of view of the political scientist as much as that of the lawyer. The author has been assiduous, and to a large extent successful, in tracking down the enormous number of incidents affecting diplomats that have occurred since 1945. Most of these incidents have had no settled legal consequence but the record is nonetheless valuable for that.

The author sticks meticulously to his brief, *i.e.*, the question of diplomatic privileges and immunities. He is not concerned with other branches of diplomatic law, such as the establishment, function and termination of diplomatic missions, and the classification of envoys. Even less is he concerned with wider problems such as credentials, representation and recognition; or with the actual practice of diplomacy; or with the status of consuls and their privileges and immunities, or with the status of international organisations and their officials and their privileges and immunities.

In the present atmosphere of egalitarianism which has affected diplomatic relations as well as domestic policies, "privilege" is almost a dirty word. If parliamentary privilege is under attack, small wonder that diplomatic privilege is criticised also. The author, like most modern writers, finds the rationale of diplomatic privileges and immunities in the functional theory rather than in older ideas such as that the diplomat is the personal representative of the Head of State or that the embassy building constitutes a foreign enclave within the national territory.

If the Vienna Convention on Diplomatic Relations (1961) be carefully examined, it will be found that diplomatic "privileges," properly so called, amount essentially to "the right to use the flag and emblem of the sending state" (art. 20), inviolability of the premises and means of transport of the mission (art. 22), inviolability of archives (art. 24), inviolability of the diplomatic bag (art. 27), inviolability of the person of a diplomatic agent (art. 29) and of his private residence (art. 30). These "privileges" can hardly be considered unreasonable and even the controversial right to instal and use a wireless transmitter was made subject to the consent of the receiving state (art. 27).

The public outcry affecting diplomats is probably directed not so much at their privileges as at their immunities, *e.g.*, immunity from criminal, civil and administrative jurisdiction (art. 31), from social security provisions (art. 33), from taxation (art. 34) and from customs duties (art. 36). It must be admitted, however, that the distinction between "privileges" and "immunities" is not entirely clear and in any case too much concentration on "privileges and immunities" is apt to give the impression that this is all that diplomatic law consists of. It is for this reason that the wider title of the Vienna Convention is well chosen and, even though Professor Wilson has quite reasonably decided to write on the narrower aspect only, it is unfortunate that he does not give more pride of place to that Convention. It is a pity, for example, that the text of the Convention has not even been included as an appendix.

However justified in principle diplomatic privileges and immunities may be, they are the more difficult to sustain in so far as the number of persons entitled to them continues to rise. In two chapters towards the end of

the book Professor Wilson does well to draw attention to the problem of government personnel stationed abroad who are not strictly diplomatic. He demonstrates, for instance, that of the 127,852 civilians employed by the United States Government in foreign countries in 1962, only 16,789 (just over 18 per cent.) came under the State Department. Leaving aside civilians employed by the military and the intelligence services, whose numbers are naturally an unknown quantity, there has been on the part of most countries a vast expansion of persons engaged abroad in aid and information services and on special missions of various kinds. The anomalous status of such persons came to light in 1961 when the United Arab Republic authorities arrested and put on trial several members of the mission sent to Cairo by France under an Agreement for the Liquidation of French Property in the United Arab Republic concluded at Zurich on August 22, 1958—a trial which, for reasons of state, was suddenly dropped. As the author points out, "there is no fully crystallised body of rules regulating and protecting" such persons, although he is fairly confident that one will gradually develop (pp. 269–271). There is undoubtedly a trend towards extending privileges and immunities to these "non-diplomats" and integrating them into the diplomatic establishment.

In his concluding chapter Professor Wilson sees both liberal and restrictive trends in operation. Liberal in that immunities are now more readily granted in respect of unofficial acts of diplomatic personnel, as well as to technical and administrative members of missions, and to servants and even, as explained above, to "non-diplomats." Restrictive in that immunities are now less freely granted to nationals working for foreign missions and in respect of trading activities. Curbs on travel by diplomats have also been extended and in *Ross* v. *The King* ([1947] 8 D.L.R. 618; *Annual Digest of Public International Cases* (1946), Case No. 76) a Canadian judge boldly but not unreasonably asserted the principle that a state has the right to grant itself a privilege—"that of its own security"—which overrides even the diplomatic privilege granted to the envoys of another state. It is therefore hardly surprising that in a recently reported case (*Peking Municipal People's Procuracy* v. *Ragunath* (1968) 62 *American Journal of International Law* 205) the Second Secretary of the Indian Embassy in Peking—notwithstanding the rule of immunity from criminal jurisdiction—was found guilty of espionage by the Peking Municipal Higher People's Court and sentenced to be deported.

Altogether, this is a stimulating, topical and wide-ranging book, useful to students of law and politics alike.

D. H. N. JOHNSON.

BRITISH INTERNATIONAL LAW CASES. Vol. 6. DIPLOMATIC AND CONSULAR AGENTS, TREATIES, ADDENDUM. [London: Stevens and Sons. 1967. xxvii and 984 pp. £10 10s. net.]

WITH this volume the series of *British International Law Cases*, so ably edited by Dr. Clive Parry, is for the time being closed. I say for the time being for two reasons: (i) because the present collection stops at 1950 and presumably there will in time accumulate sufficient material to warrant the publication of a supplementary volume, and (ii) the original intention of including in the series cases on the law of war and neutrality, as well as on the law of peace, has apparently been only shelved and not abandoned. A decision to include this other material, which presumably comprises mostly prize cases without being confined to them, would doubtless require several extra volumes. In the meantime it is proposed to go ahead with a proposal to publish two volumes of *Commonwealth International Law Cases* on the law of peace. For this decision we may be thankful.

As things stand, the collection of 710 decisions into six volumes, involving

the compression of 10,000 pages into just under 5,000 pages, without any abridgment, represents a useful and technically competent achievement. Of course it is no great scholastic achievement and the only point which falls for comment is whether the Editor and his team were right to apply to their task a self-denying ordinance which involved the inclusion of virtually no editorial material whatever in the form of explanatory notes, definitions of ancient legal terms, translations of unfamiliar Latin maxims and so on. Certainly the addition of such material would have been of assistance to foreign readers, and by no means only to foreign readers, especially when it is realised, for instance, that, of the twenty-eight cases included that relate to the law affecting servants of diplomatic agents, the earliest is dated 1724 and the latest is dated 1888. Still, it must be said in defence of the Editor and his team that, once embarked on the addition of such material, it would have been difficult to know where to stop and the cost of the venture would have been inflated considerably.

Needless to say, a volume under the present title includes many cases that will be familiar to almost anyone who has ever studied international law (*e.g.*, *Musurus Bey* v. *Gadban*, *Barbuit's Case*, *The Hlka Ann* and other old favourites). But it says something for the strain the Editor has been operating under, as well as for his wisdom in employing the tail end of this volume for including an Addendum, that he had not previously been able to find room for such an important case as *De Wütz* v. *Hendricks* ((1824) 2 Bing. 314).

This collection has been made possible by assistance from the British Institute of International and Comparative Law and the International Law Fund. Along with the gradually maturing *British Digest of International Law* it represents a useful strengthening of the literature, available in convenient form, on the law of nations as understood and practised in this country.

D. H. N. Johnson.

THE EFFECTIVENESS OF INTERNATIONAL SUPERVISION. By E. A. LANDY. [London: Stevens; Dobbs Ferry, N.Y.: Oceana. 1966. xiii and 268 pp. £3 17s. 6d.]

THE LAW GOVERNING EMPLOYMENT IN INTERNATIONAL ORGANIZATIONS. By M. B. AKEHURST. [Cambridge: Cambridge University Press. 1967. xxvii and 294 pp. 80s.]

MR. LANDY opens his consideration of *The Effectiveness of International Supervision* with the statement that "future historians may remember the Twentieth Century not only as an era of total war and scientific revolution but also as the period when the problems of peace and world order were tackled for the first time on a global scale," and points out that "the basic tool used in building this new system is the law-making treaty" (p. 1). Among the Organisations that have contributed most to institutionalising world order the International Labour Organisation stands well-nigh supreme and this book serves as a testament to thirty years of achievement and experience by that body.

In so far as International Labour Conventions are concerned, the task of supervision sounds overwhelming. More than 100 such treaties have been drawn-up and these have received some 4,000 ratifications (p. 4). It is only when one recalls that there are over 120 states in the world that one realises how comparatively sparse is the operation of international labour standards on a universal scale (the appendices, pp. 218–256, are enlightening).

Mr. Landy provides a useful survey of the ILO's supervisory machinery and examines how this works in practice, partly by general description and partly by case studies of particular Conventions. It is interesting to note that Conventions relating to indigenous and plantation workers seem to receive greater compliance than those on freedom of association (pp. 69–70). Again,

it may come as a surprise to find that, while Western Europe is the most responsive of regions "the countries of Eastern Europe and the Middle East also appear to have acted more fully on the comments of the Supervisory Committee than those elsewhere.... In the case of South and Central America, and of Asia and the Far East, the degree of response has been well below average" (p. 74). Often critics have implied that the lack of ratification may be explained by the number of states affected which are federal and are handicapped by constitutional limitations. Mr. Landy (Chaps. 4 and 5) indicates that the reasons are far wider than this and are often of a practical as much as of a legal character. He also indicates (p. 114) that attempts are now being made to facilitate observance by federal states.

Commentators on the ILO invariably remark on the significance of its tripartite character. Mr. Landy goes further and suggests that it would be helpful if this tripartism could be extended to the field of supervision (p. 191). While he is rightly proud of the ILO's achievement, he is equally conscious of its shortcomings (p. 201). He is convinced, however, that "over a period when the technical and mutual examination procedures have noticeably gained in strictness, the rate of ratification has accelerated rather than slowed down" (p. 208). In so far as the experience of the ILO is of significance for other organisations, Mr. Landy points out that the Organisation was consulted on supervision in connection with the European Social Charter, formed an example for UNESCO's Convention against Discrimination in Education, and in connection with the recently adopted United Nations Covenants on Human Rights, and the author feels that the "ILO's experience in giving non-governmental elements a role in supervision may" even prove useful in disarmament control—after all the Soviet delegate at the League's Disarmament Conference had suggested that workers might report infractions (p. 209).

Supervision of a vast network of international treaties depends to some extent on the effectiveness of the staff of the supervisory organ and the ILO has played a major role in the development of an international civil service and the establishment of its rights, a subject which forms the basis of Dr. Akehurst's survey of *The Law Governing Employment in International Organisations*. The first part of the study is concerned with the sources of the law, such as the contract of employment and the staff regulations, but such written provisions are not always sufficient, "even if they were interpreted in the most extensive or strained manner" (p. 72), so that general principles of law relating to interpretation, procedure, administrative law and such principles as good faith and tortious liability, are called in aid by the tribunals which deal with the rights of the international civil service. After examining the sources of law, Dr. Akehurst goes on to consider judicial review of administrative decisions and it is here that the general principles of law are so important. "The judgments may sometimes give the impression that general principles of law usually operate in favour of the officials. The explanation is that the tribunals seldom have to concern themselves with preserving the interests of the Administration; the Administration takes care to see that provisions are inserted in the Staff Regulations to give it all the powers it needs" (p. 114).

A problem that arises with any form of public service concerns changes in the conditions of service after the employment has commenced, and the last portion of this work is concerned with unilateral amendment of the conditions of service. It would appear that although an organisation has legislative powers over its staff, it may not unilaterally revoke rights which are expressly set out in a contract, nor may it make retroactive amendments to any rules, although it may bind itself concerning the procedure to be adopted for enacting future amendments, while there is some doubt whether an amendment clause in the contract can give the organisation wider powers of amendment than it would otherwise have possessed (pp. 244–245).

For the main part, *The Law Governing Employment in International Organizations* is concerned with the internal law of the organisations. There is, however, also the problem of the relationship of that internal law with international law, it being borne in mind that unlike international law the internal law of international organisations is drawn up and becomes binding regardless of the participation or consent of those to whom it applies (p. 258). Arguments can be put forward both for and against the view that this internal law is a form of international law, or to support the contention that it is more akin to municipal administrative law. But it must be remembered that whatever system it may be analogous to, "the validity of the internal law of an international organisation is derived from the constituent treaty of the organisation, the validity of which is in turn derived from international law. An international organisation could not have existed before the development of international law, and the disappearance of international law would entail the disappearance of all international organisations" (p. 259). This contention, however, overlooks the possibility that the law of, for example, the European Community might have transcended international law and become intra- or supra-national law, with the existence of the Community being no longer dependent on the continuance of international law.

In his concluding remarks, Dr. Akehurst draws attention to two facts that cannot be overemphasised. On the one hand, he points out that the experience of the last fifty years is such that we are now able to talk of a *Law Governing Employment in International Organisations* which is tending to become general for all organisations. He also comments that although his study has tended to be based on the practice of tribunals dealing with alleged breaches of that law, this "gives the false impression of a continuous *conflict* between the Administration and its staff—whereas in reality *co-operation* is a much more normal feature of the international civil service; the interests of the parties are in most cases convergent rather than divergent" (p. 284, italics in original).

L. C. Green.

Essays on the Law of Treaties. By Ingrid Detter. [Stockholm and London: P. A. Norstedt and Söners förlag. Sweet and Maxwell. 1967. 118 pp. 37s. 6d.]

Much of the substance of this small work was originally delivered as lectures at Oxford in 1967. Included are essays on the ways to express consent to treaties, their entry into force, registration, reservations, revision, termination and the effect of treaties upon third parties.

The work is pleasantly presented and well documented with helpful footnotes, though its style at times savours of Justinian's *Digest* in its terseness. Professor Detter has some novel suggestions to make. Thus she considers consent to treaties in terms of procedure; the "long or complex" procedure, the "short" procedure and the "very short" procedure. The "long procedure" is where ratification occurs. The danger in this approach is to consider that there is some kind of rule which reads "In the case of long procedures ratification is necessary," which is clearly tautologous.

The chapter on registration, like the others, provides a useful, if brief, survey of the position, but Article 102 of the United Nations Charter, requiring registration of treaties concluded between members of the Organisation alone, or members and non-members, if they are to be invoked before any organ of the United Nations, is rather slightly treated. The author rightly points out that the article cannot impose obligations upon non-members, but adds that non-members may not invoke an unregistered treaty before the I.C.J. Is the author referring to a treaty between members and non-members, or one between non-members alone? Article 102 (2) refers to the former only. The point is made later, and might have been explained more fully, that *vis-à-vis* non-members Article 102 is a *res inter alios acta*.

The chapter on reservations contains helpful material. Particularly useful for the undergraduate is a survey of the proposals concerning the validity of reservations, made by the various rapporteurs to the International Law Commission and others, though this aspect has been considered in greater detail by D. R. Anderson in 18 I.C.L.Q. 450. Professor Detter argues that reservations are exemptive. They exclude the consent of a party to an international agreement from certain provisions of the instrument, rather than being definitive or interpretative, or even modificatory (pp. 50–57). The necessary difference between modification and exemption is not easy to grasp, and is left unexplained.

The main criticism of Professor Detter's work arises from its brevity, for there is a tendency for propositions to be made and then left unamplified, amplifications which an undergraduate at any rate would require. Why should it be presumed that bilateral treaties that do not expressly provide for ratification are validly concluded at signature (p. 24)? This does not square with the decided cases cited by Professor Detter. Does the phrase "as soon as possible" in Article 102 (1) of the United Nations Charter, apart from leaving a certain discretion to states, really mean "at any time," as the author suggests on page 48? It is a pity that there is no index, though the exhaustive Table of Contents is helpful. An unfortunate error on page 101 renders the text the opposite of that which the writer intends. This is one of a number of grammatical and typographical errors. Nonetheless this volume of essays provides a useful introduction to the law of treaties, an aperitif before moving on to McNair and the specialised articles.

CLIFFORD HALL.

THE CIVIL CODE AND THE CODE OF CIVIL PROCEDURE OF THE RSFSR 1964. Translated by A. K. R. KIRALFY. (Editor, Z. SZIRMAI.) (Law in Eastern Europe, No. 11.) [Leyden, The Netherlands: A. W. Sijthoff. 1966. 812 pp. Dfl. 42.50.]

THIS excellent translation of the Soviet Russian Civil Code and Code of Civil Procedure, both of 1964, will be welcome to comparative lawyers in English-speaking countries, for although there is now a considerable literature in English on Soviet law, much of it has been rendered obsolete by the appearance of these new Codes, and in any case the serious student wants to have the *ipsissima verba* of the legislator easily available. From both legal and linguistic standpoints the new Codes are a great improvement on their predecessors, the Civil Code of 1922 and the Code of Civil Procedure of 1923. Nevertheless, ambiguities have not been entirely avoided, and these are usually carefully preserved in the English rendering; but Professor Kiralfy was rather unlucky with section 368 of the Code of Civil Procedure, for a line has dropped out of the text and he opted for the more obvious though harsher meaning of the ambiguous Russian original, whereas Soviet commentators explain the provision in accordance with its less obvious but more equitable meaning. The translation throughout is so accurate and readable that it is hardly possible to criticise it except in a very few isolated instances; for example, "deducted" seems preferable to "calculated" in section 382 of the Code of Civil Procedure. Occasionally a footnote provides additional aid to comprehension, and it is a pity that these footnotes have been used so sparingly, for there are several places where they could have been useful: for example, it is not immediately obvious what is meant by "a demand based on an indorsement in execution" (s. 271 of the Code of Civil Procedure). The proof-reader seems to have dozed off into a pre-Emancipation reverie at section 265 of the Code of Civil Procedure, for we read of "persons declared ownerless," but this is virtually his only lapse. The difficulties involved in translating continental codes and other legal materials into English are well known, and they are aggravated in the case of Russian by reason of the basic differences in background, outlook and presuppositions between the original

Russian draftsmen and their English translator. Professor Kiralfy is to be congratulated on a most successful achievement, and the publishers on maintaining the general high standards of the series.

E. L. Johnson.

Legal Controls in the Soviet Union. By Leon Boim, Glenn G. Morgan and Aleksander W. Rudzinski. (Editor, Z. Szirmai.) (Law in Eastern Europe, No. 18.) [Leyden, The Netherlands: A. W. Sijthoff. 1966. 360 pp. Dfl. 48.]

The term "legal controls" is used in a very wide sense and covers a number of institutions and methods used by the Soviet state for ensuring the observance of its laws. The first part of the book, by Leon Boim, conducts the reader through the maze of institutions with powers of supervision and control, and is interesting particularly for the light which it throws on the difficult subject of the relations between the Government of the U.S.S.R. and the Communist Party of the Soviet Union, and for the illustrations of "control" in practice. The account of the investigation into the activities of the State Law Publishing House, which uncovered a "racket" highly profitable to certain academic legal writers, is fascinating and unfortunately too short. Transliteration seems to have given Professor Boim some difficulty: doubtless few would imagine that the Lenin, V. I. of page 18 is different from the Lenin, W. J. of page 55, but it is by no means clear whether the organisation referred to as "CCC" on page 57 is the same as the "Ts.K.K." of the preceding page. References to the Polish translations of Lenin's works are not particularly helpful to the English reader: surely either the originals or the English translations could have been used. The second part of the book consists of translations of items from Soviet legal periodicals dealing with "protests" by procurators against *ultra vires* rules and orders, and is prefaced by an Introduction by Professor Glenn G. Morgan. Though the reading is somewhat repetitive this section gives a good idea of what the general supervision work of the Soviet procuracy amounts to in practice. The third part consists of a comparative study by Mr. Rudzinski of the methods of attacking judgments which have come into force (so that appeal in the ordinary sense is no longer available) in France, the U.S.S.R. and Poland, with brief notes on the position in the Canton of Berne, Austria and Nazi Germany. There is no comparison with Anglo-American practice, so the common lawyer is liable to miss many of the points made; this is unfortunate, especially in a book intended for English-speaking readers, as the problems discussed are universal in nature. The book is well produced and is a valuable addition to the series.

E. L. Johnson.

Law, Morality and Religion in a Secular Society. By Basil Mitchell [Oxford: University Press. 1967. 141 pp. including index. 25s. net.]

The celebrated controversy between Lord Devlin and Professor Hart has now attained the accolade of a book comprising the Edward Cadbury Lectures delivered at the University of Birmingham in the spring of 1966. Although the author can hardly be said to cast any piercing new light on this controversy (which has already been fully explored in many previous articles by other writers), his careful analysis does serve both to pin-point such differences as still divide the disputants, as well as to bring out the doubts and obscurities on both sides of the argument. The reader is rather led to the conclusion that in the final analysis there is not very much separating the rival positions, and he may accordingly be led to wonder, particularly as the author seeks to stress the basic liberalism of both, what all the fuss was about. This would, however, be to overlook the way in which both controversialists have modified their original positions by various subtle refinements, which have tended to bring

them a good deal nearer together than they seemed when the initial clash took place. In particular, Professor Hart's invocation of the principle of "paternalism" to supplement or modify Mill's original insistence on harm to others as the sole precondition for law being employed to enforce morality, and the later recognition by Lord Devlin of the need to test the morality of the common man by the criterion of educated and informed opinion, tend to give a certain air of unreality to a debate which initially seemed to involve a major clash of principle.

Mr. Mitchell's sympathy, although he presents the arguments in a very fair-minded way, clearly tends towards the position of Lord Devlin in these matters. This is further demonstrated by the final two chapters of the book in which he discusses the relation of religion to morality. Here, his main thesis, developed rather briefly, is that we are not entitled to disregard theological arguments, especially those derived from Christian theology, in connection with the formation of rules of law. It is not, however, altogether clear quite what the author includes in his concept of theological arguments. Presumably he would not expect the English legislator to be swayed by papal pronouncements on the non-use of artificial methods of contraception, nor does he make altogether apparent to a reader not already persuaded of the truth of some particular tenet of Christianity, why in a secular society such a tenet should prevail in deciding the course of legislation, unless it can be justified by some other rational, experimental or utilitarian criterion.

It is a little curious that at the conclusion of so carefully reasoned a work, the author finally lapses into an attempt to mitigate his assertion that no clear line can be drawn between public and private morality, by qualifying this with a series of "considerations" which he states that the legislature should always bear in mind. These, such as the principle that privacy should be respected, etc., though of an unexceptionably liberal character, do not enjoy the benefit of any supporting arguments.

LLOYD OF HAMPSTEAD.

FREEDOM UNDER THE LAW. By LORD DENNING. [London: Stevens and Sons Ltd. 1968. 126 pp. 12s. 6d. net.]

THIS is a reissue in paperback form of the first of the series of Hamlyn Lectures delivered in 1949. The lectures, as is well known, are stimulating and in the Denning style. It is a great pity, however, that the opportunity was not taken of bringing the lectures up to date as was done in the same series by Professor Glanville Williams in his outstanding work on *The Proof of Guilt*.

THE AFRICAN LAW REPORTS—COMMERCIAL SERIES 1965. General Editor: DR. ALAN MILNER. [New York: Oceana Publications Inc. 1968. $20.]

THIS is the first volume in a series which will publish all English-language judgments from the superior courts of seventeen African countries from 1900 to the present. This volume covers 1965; the series will then continue with current volumes and also give coverage back to 1900.

CAUCASIANS ONLY. THE SUPREME COURT, THE NAACP AND THE RESTRICTIVE COVENANT CASES. By CLEMENT E. VOSE. [California: University Press; London: Cambridge University Press. 1968. 296 pp. including index. Paperback 29s. 6d.]

THIS book was originally printed in 1959. It describes the sociological and political events leading to the American Supreme Court decisions which held that racial restrictive covenants in housing were not enforceable and also assesses the practical results of these rulings. Much has happened in race relations since that time and the book provides an interesting comparison with recent developments in England.